TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 230

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

NEW YORK & PENNSYLVANIA COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED DECEMBER 27, 1924

(30,756)

(30,756)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 791

NEW YORK CENTRAL RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

NEW YORK & PENNSYLVANIA COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

INDEX

	Original	Print
Record from common pleas court of Clinton County	1	1
Docket entries	1	1
Sheriff's return to summons	1	1
Order to show cause	2	2
Order for judgment	2	2
Judgment	3	2
Judgment from supreme court	4	3
Clerk's certificate	5	3
Praecipe for summons	6	4
Statement of claim	7	4
Exhibit A—Report of public service commission	12	7
Exhibit B—Order of commission to file tariff schedules	21	12
Exhibit C—Order amending order to file schedules	22	13
Exhibit D—Order denying petition for rehearing	23	13
Exhibit E—Supplemental report and order	24	14
Exhibit F—Report of commission	26	15
Exhibit G—Order No. 1 of commission	32	19

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	Original	Print
Exhibit H—Order No. 2 of commission	33	20
Summons and sheriff's return	35	21
Appearances of counsel	36	22
Affidavit of defense of New York Central R. R. Co.	38	22
Exhibit A—Report of Interstate Commerce Commission in case of New York & Pennsylvania Company vs. Director General, as agent, etc.	46	27
Affidavit of defense of Pennsylvania R. R. Co.	55	32
Exhibit A—Report of Interstate Commerce Commission in case No. 11729 (copy)....(omitted in printing)	62	36
Order to show cause (copy).....(omitted in printing)	71	36
Reasons in support of motion for judgment against the Pennsylvania R. R. Co.	72	36
Reasons in support of motion for judgment against the New York Central R. R. Co.	75	38
Opinion, Baird, J.	78	39
Bond on appeal.....(omitted in printing)	92	47
Proceedings in supreme court of Pennsylvania	96	47
Writ of certiorari	96	47
Order enlarging time	97	48
Order to hold record	98	48
Docket entries	99	49
Appeal and affidavit	102	51
Notice of appeal	103	52
Assignments of error	104	52
Order enlarging time	109	56
Petition for reargument	112	56
Answer to petition for reargument	135	68
Opinion, Sadler, J.	139	70
Motion and order to hold record	149	75
Petition for reargument	152	76
Order for return of record	191	95
Petition for writ of error	193	95
Assignments of error	201	99
Order allowing writ of error	205	101
Writ of error	206	101
Citation and service.....(omitted in printing)	208	102
Bond on writ of error.....(omitted in printing)	209	102
Præcipe for transcript of record	211	102
Clerk's certificate	212	103
Judge's certificate to clerk	213	103
Clerk's certificate to judge	213	104

[fol. 1] **IN COMMON PLEAS COURT OF CLINTON COUNTY, JANUARY TERM, 1923**

Docket Entries

No. 5

THE NEW YORK AND PENNSYLVANIA COMPANY, a Corporation of the State of Pennsylvania,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation of the State of New York, and The Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania.

B. F. Geary.
Parker McCollester and McCormick & Hipple.
Henry Wolfe Bikle and McCormick & Hipple.

Summons in Assumpsit, returnable the fourth Monday of November, 1922, issued October 19, 1922.
October 19, 1922.—Statement of Plaintiff's Claim filed.
October 19, 1922.—2 certified copies of Plaintiff's Claim issued to the Sheriff.

SHERIFF'S RETURN TO SUMMONS

Now, Oct. 21, 1922, served the within Summons in Assumpsit, together with Statement of Claim upon the New York Central Railroad Co., a corporation, by handing true and correct copies of the within Writ to I. H. Kennedy, its Agent, at its Station at Castanea, Clinton County, Pa., and making known to him the contents thereof upon inquiry thereat, the residence of the President, Secy., Treas., Cashier, Chief Clerk, or other Executive officers, was not to be found in the County of Clinton.

Same day served same Writ upon the Penna. Railroad Company, a corporation, by handing true and correct copies of the within Writ to D. R. Goodlander, its Agent, at its Station, Lock Haven, Clinton County, Pa., and making known to him the contents thereof upon inquiry thereat the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk or other Executive officer was not found in the County of Clinton.

So ans.—

Tom Johnston, Sheriff.

Nov. 27, 1922.—Appearance of Parker McCollester, McCormick & Hipple, for New York Central Railroad Co. filed.
Nov. 27, 1922.—Appearance of Henry Wolfe Bikle, McCormick & Hipple, for Pennsylvania Railroad Co. filed.

[fol. 2] Nov. 27, 1922.—Affidavit of Defense of New York Central Railroad Co. filed.

Nov. 27, 1922.—Affidavit of Defense of Pennsylvania Railroad Co. filed.

Dec. 14, 1922.—Motion for Judgment filed.

ORDER TO SHOW CAUSE

And now, to-wit, Dec. 14, 1922, on motion of Thomas Raeburn White and B. F. Geary, Attys. for Plaintiff, a Rule is granted on Defendants above named to show cause why judgment should not be entered in favor of the Plaintiff and against the Defendants for want of a sufficient Affidavit of Defense. Returnable fourth Monday of January, 1923.

By the Court,

E. H. Baird, P. J.

12/16/1922.—Service accepted and issuing of the Rule waived. McCormick & Hipple and M. E. Haggerty, Attorneys for Deft.

Jan. 8, 1923.—Reasons in support of motion for Judgment filed.

Jan. 8, 1923.—Reasons in support of motion for Judgment filed.

Jan. 8, 1923.—Service of within Reasons in support of motion accepted.

McCormick & Hipple, Attorneys for Defendants.

July 23, 1923.—Opinion of the Court filed.

ORDER FOR JUDGMENT

Now, July 23, 1923, the rule to show cause, heretofore granted is [fol. 3] made absolute, and the Prothonotary is directed to enter Judgment accordingly, amount to be liquidated by him.

By the Court,

E. H. Baird, P. J.

Now, July 23, 1923, the defendants excepts to above order, and at their request a Bill is sealed.

By the Court,

E. H. Baird, P. J.

JUDGMENT

And now, July 23, 1923, by the direction of the Court Judgment is entered in favor of the Plaintiff and against the Defendants for the sum of Six Thousand Five Hundred Forty-six 43/100 Dollars as follows:

Principal	6,172.97
Interest from July 20, 1922, to July 23, 1923	373.46
Real debt	$6,546.43

Entered July 23, 1923, Judgment $6,546.43.

L. D. Geo. G. Hickoff, Prothy.

Aug. 8, 1923.—Bond on Appeal in the sum of $14,000 filed.
Aug. 8, 1923.—The within bond approved. George G. Hickoff, Prothy.
Aug. 11, 1923.—Certiorari to the Supreme Court filed.
[fol. 4] May 5, 1924.—Remittitur from Supreme Court filed.

And it was so proceeded in our Supreme Court that the following was made to-wit:

JUDGMENT OF SUPREME COURT

The Judgment is affirmed and the record proceedings thereupon and all things concerning the same were agreeably to the direction of the Act of Assembly in such case made and provided, ordered by the said Supreme Court to be remitted to the Court of Common Pleas, for the County of Clinton aforesaid, as well for execution or otherwise as to Justice shall appertain, wherefore we here remit you the Record of the Judgment aforesaid, and the proceedings thereupon, in order for execution or otherwise as aforesaid.

Witness the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our Supreme Court at Philadelphia, first day of May in the year of our Lord, (1924).

Thomas Robbins, Pro.

May 13, 1924.—On receipt of telegram returned the Record.
May 14, 1924.—Certificate of Order for Return of Record filed.
July 22, 1924.—Remittitur filed, and Opinion of Court filed.

The Judgment is affirmed.

Witness the Hon. Robert von Moschzisker, Doctor of Law, Chief Justice of our said Supreme Court at Philadelphia, the 19th day of July, 1924;

Thomas Robins, Prothy.

August 1, 1924.—On receipt of order returned the Record to Prothonotary of Supreme Court, Philadelphia, Pa.
Record received, October 14, 1924.
Oct. 20, 1924.—Order to Return Record filed.
Oct. 20, 1924.—Record returned by registered mail.

[fol. 5] IN COMMON PLEAS COURT OF COUNTY OF CLINTON

CLERK'S CERTIFICATE

I, Geo. G. Hickoff, Prothonotary of the Court of Common Pleas, in and for the County of Clinton, and State of Pennsylvania, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the Record and proceedings in the said cause,

so full and entire as the same remains of record in my office, entered in Appearance Docket No. 27, to No. 5 January Term, 1923, in the Court of Common Pleas of Clinton County, Pa.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court, this Twenty-fourth day of December, A. D. 1924.

Geo. G. Hickoff, Prothonotary. (Seal.)

[fol. 6] IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

PRECIPE FOR SUMMONS—Filed October 19, 1922

Issue summons in assumpit, returnable to fourth Monday of Nov., 1922.

Damages, —.

To Geo. G. Hickoff, Esq., Prothonotary.

T. R. White, B. F. Geary, Attorneys for Plaintiff.

[File endorsement omitted.]

IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

STATEMENT OF CLAIM—Filed Oct. 19, 1922

Plaintiff, New York and Pennsylvania Company, a corporation of the State of Pennsylvania, having its principal office and place of business at Lock Haven, Clinton County, Pennsylvania, claims of defendants, The New York Central Railroad Company, a corporation of the State of New York, and The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, the sum of Six thousand one hundred seventy-two Dollars and ninety-seven Cents ($6,172.97), with interest from July 20, 1922, which sum is justly due and payable to the plaintiff by the defendants upon a cause of action whereof the following is a statement:

1. Plaintiff is a large consumer of bituminous coal which is shipped to it from the Munson and Hawk Run Districts in Central Pennsylvania, over the lines of the defendant, The New York Central Railroad Company to Bald Eagle Junction, Pennsylvania (otherwise known as Mill Hall), and thence over the lines of defendant, The Pennsylvania Railroad Company to Lock Haven, Pennsylvania, where plaintiff's mills are located.

[fol. 8] 2. On and prior to February 29, 1920, the freight rates charged and collected by defendants on coal so shipped, according to their tariffs duly filed, consisted of a rate of 70c per ton of 2,240

pounds, charged by the defendant, The New York Central Railroad Company, for the movement from the mines to Bald Eagle Junction, and a rate of 40c per ton charged by the defendant, The Pennsylvania Railroad Company, for the movement from Bald Eagle Junction to Lock Haven, making a through rate of $1.10 per ton for the total movement.

3. On and prior to February 29, 1920, the lines of the defendants were under Federal control, pursuant to the Acts of Congress in such case made and provided, and on March 1, 1920, pursuant to the terms of an Act of Congress, known as the "Transportation Act 1920," particularly section 208 (a), Federal control terminated and the lines of railroads were restored to the defendants, their owners.

4. Prior to March 1, 1920, the plaintiff filed a complaint with the Public Service Commission of the Commonwealth of Pennsylvania against the rates above described, alleging that they were, and upon re-establishment of State authority thereover would be unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of the Commonwealth of Pennsylvania.

5. On August 25, 1920, while said proceedings were pending and undetermined, pursuant to general increases which were then permitted, and by tariffs duly filed, defendants increased the joint rate for said transportation of coal from $1.10 to $1.54 per ton, which thereafter was charged and collected.

6. Answers were duly filed by the defendants to said complaint, hearings were had, and the Commission made its report on August [fol. 9] 17, 1921, and entered orders on August 16, 1921, and August 29, 1921, wherein and whereby it found and ordered that the just and reasonable rate for said through movement of coal for the period from March 1, 1920, to August 25, 1920, was $1.00 instead of $1.10 per ton, and that the just and reasonable rate effective August 26, 1920, was $1.40 instead of $1.54 per ton. Said Commission held that the rates aforesaid, to the extent that they exceeded the rates so found to be reasonable, were unjust, unreasonable, excessive and contrary to law. Thereafter defendants filed a petition for a re-hearing, which was in due course refused. Copies of the report and orders of the Commission in the premises are hereto attached and made a part hereof, marked Exhibits "A", "B", "C", "D" and "E."

7. Plaintiff avers that the rates charged as aforesaid, viz: $1.10 from March 1, 1920, to August 25, 1920, inclusive, and $1.54 after August 26, 1920, were unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of the State of Pennsylvania, to the extent aforesaid.

8. No appeal was taken by the defendants from the said report and orders or any of them.

9. Between March 1, 1920, and August 31, 1920, both inclusive, there was shipped to plaintiff over defendants' lines as aforesaid 54,830.34 gross tons of coal, for the transportation of which plaintiff paid defendants freight in excess of reasonable rates as aforesaid in

the amount of $5,484.41, and during the period from August 31, 1920, until November 3, 1921, when the reduced rates became effective by the order of the Commission, 119,406.87 gross tons, for the transportation of which plaintiff paid defendants $16,708.40 in ex-
[fol. 10] cess of said reasonable rates. Plaintiff and defendants agreed upon these amounts and there is no dispute concerning them.

10. Plaintiff consumed all of the coal so shipped to it on which said excess charges were paid, and did not pass on to any other person or corporation the loss sustained by reason of its having paid said unlawful rates.

11. Plaintiff duly filed its petition for reparation for the excess payments on coal moving as aforesaid (P. S. C. Docket No. 4738); answers were filed by defendants, and the case was so proceeded with that on June 20, 1922, two orders were promulgated by the Commission, one directing the defendants to pay to plaintiff reparation for excess charges on shipments moving between March 1, 1920, and August 31, 1920, in the amount of $6,172.97 (interest having been added), and one for the period from September 1, 1920, to November 3, 1921, the sum of $17,978.17. Copies of the report and orders of the Commission are hereunto annexed and made a part hereof, marked Exhibit "F," "G" and "H."

12. Defendants paid Order No. 2 covering reparation in the amount of $17,978.17.

13. Order No. 1, directing defendants to pay the plaintiff the sum of $6,172.97, was duly served on the defendants as indicated by their acceptance of service on file with the Public Service Commission, dated July 5, 1922, but they have failed and refused to pay the said order or any part thereof.

Wherefore, plaintiff claims the sum of $6,172.97, with interest from July 20, 1922.

(Signed) B. F. Geary, T. R. White, Attorneys for Plaintiff.

[fol. 11] Jurat showing the foregoing was duly sworn to by E. L. omitted in printing.

[fol. 12] EXHIBIT "A" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Report of the Commission

By the COMMISSION:

This complaint is directed against the rate on Bituminous Coal in carloads, from the Munson District and Hawk Run District in Central Pennsylvania on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad, as published in Supplement No. 7 to New York Central Railroad Joint, Local and Proportional Coal Tariff No. 553, P. S. C., Pa., N. Y. C., No. C-38, and Pennsylvania Railroad Local Tariff, C. & C., P. S. C., Pa., No. 783. The former publishes 70 cents per 2,240 pounds to Bald Eagle Junction (proportional) for Lock Haven, Pa., deliver, subject to the following note:

"This proportionate rate to Bald Eagle Junction, Pa., applies only on shipments for delivery to Pennsylvania R. R., at Bald Eagle Junction, Pa., for movement by that company to Lock Haven, Pa., via Pennsylvania R. R., to which point no through rates are published. Freight charges must be prepaid except when arrangements are made for collection at final destination."

The tariff of the Pennsylvania Railroad publishes 40 cents per 2,240 pounds from the Junction (known on the Pennsylvania as Mill Hall Junction) to Lock Haven, thereby constituting a through rate of $1.10 per 2,240 pounds.

These rates were initiated by the Director General and being those in effect on February 29, 1920, became, with the termination of Federal control, the established rates on March 1, 1920, by virtue of the "Transportation Act, 1920," entitled "An Act to provide for the termination of Federal control of railroads and systems of transportation, etc.," particularly Section 208 (a).

The complaint was filed prior to March 1, 1920, and avers that the said rates established by the Director General will be unjust, unreasonable, excessive and discriminatory after the return of the said railroads, and will be in violation of The Public Service Com-
[fol. 13] pany Law: that since three years have not elapsed since December 10, 1917, when the rates on said movement were fixed

by this Commission, and thirty days' notice previous to application to the Commission and service of notice of such application not having been made is a violation of said order of the Commission of December 10, 1917, and of Paragraph (f), Section 1, Article II, of The Public Service Company Law; that complainants will be greatly damaged by the charging of the said rates; that the respondents be ordered to put into effect rates which will not exceed the rates established in said order of December 10, 1917; and that reparation be awarded to complainant in respect of all rates and charges which it may be compelled to pay after March 1, 1920, in excess of the rates established by said order of December 10, 1917.

Under date of July 24, 1917, the Commission determined and ordered established the proportional rate of 45 cents per 2,240 pounds to apply from the Munson and Hawk Run Districts to Bald Eagle Junction on the New York Central Railroad. The rate of the Pennsylvania Railroad from the junction to Lock Haven was at that time 20 cents per 2,240 pounds. The effect was to establish the through rate of 65 cents.

During the same year, pursuant to a general increase in coal rates, the carriers sought to increase each of these rates by fifteen cents which would have had the effect of increasing the through rate thirty cents per ton. Complainants, amongst others, attacked the proposed increase and later, on December 10, 1917, an order was made which established the rate from the Munson and Hawk Run Districts to Bald Eagle Junction (Proportional) on the New York Central Railroad as 55 cents per 2,240 pounds and the Pennsylvania Railroad rate, Mill Hall Junction (Bald Eagle Junction) to Lock Haven, 25 cents per 2,240 pounds, the sum being the through rate [fol. 14] 80 cents per 2,240 pounds. These rates were published by the carriers effective December 24, 1917.

The complainant contends that the Transportation Act of 1920, Section 208 (a), does not establish the legal intrastate rates on March 1, 1920; that Congress has no authority to regulate Intrastate Commerce and therefore cannot fix these rates as the legal rates. Even if the said act is intended to apply to intrastate rates and to continue in effect for such traffic rates established by the Director General, upon relinquishment from Federal control the State law becomes immediately operative. The rates herein issued having been determined by the Commission within three years of March 1, 1920, those rates as increased during Federal control can be made legal only after an application to the Commission, upon thirty days' notice, as prescribed in The Public Service Company Law, Article II, Section 1 (f).

The respondents argue that in view of the decision in Northern Pacific Railway Co. vs. North Dakota, 250 U. S., 135, there is no question that during the period of Federal control the rates in issue were the lawful rates; and since they were the lawful rates on February 29, 1920, they continue to be the lawful rates by virtue of Section 208 (a) of The Transportation Act, and that the provisions of the Pennsylvania Public Service Company Law do not render them illegal.

The Transportation Act of 1920, Section 208 (a), establishes the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates "shall continue in force and effect until thereafter changed by State * * * authority." Congress enacted the [fol. 15] laws which made possible the assumption of control and the operation of the railroads of the country and logically must provide the legislation for the return of those properties to their owners.

Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners.

The provision of the law here invoked is that portion of sub-section (f) of Section 1 of Article II:

" * * * That no rate, practice, or classification which shall have been determined by the Commission shall be changed or discontinued by the Public Service Company, directly or through any change in classification, rules, regulations, contracts, or practices, within a period of three years after such determination, without application to and the approval of the commission, of which application thirty days' prior notice shall be given in the said tariffs, or schedules to the public: * * * "

We cannot agree with the contention of the complainant that, because of the failure of the respondent to make the application and to give thirty days' prior notice thereof as required by this provision of the act, the rates determined within the three-year period and in effect prior to Federal control must be re-established. There were extraordinary circumstances obtaining preliminary to the termination of Federal control—the time when the application should have been prepared. It will be recalled that the date for the restoration [fol. 16] of the carriers to their owners was enveloped in much uncertainty and was at least once postponed. When a definite course was finally decided upon which took form in the Transportation Act, that act became a law, but two days before the date fixed for the return of the carriers, namely, February 28, 1920. The act provides that "Federal control shall terminate at 12:01 A. M. March 1, 1920; * * * " Upon the same day the rates became effective. Prior thereto the respondents' officials were answerable to the Director General for all actions. It was, therefore physically impossible to the respondents to file the application and give thirty days' notice thereof prior to the effective date. In justice to the respondents and under a reasonable appreciation of the peculiar state of affairs attending the return of the railroads to their owners, we are not inclined and do not consider ourselves justified to declare the rates under attack illegal upon this technicality. In all other respects, and to the fullest extent possible, the provision of the law

must be enforced. It is proper that the Commission shall review these rates which are changes made within the three-year limit of repose allowed rates determined by it, giving due consideration to the events which intervened.

The rules as to the burden of proof should be the same, it is contended by complainant, as if Federal control had not taken place, and, therefore, the respondents must justify the increases over the rates determined by the Commission.

Respondents' position is that since this rate is now lawfully in effect and is not a rate which is proposed to be put into effect, it follows that under Article V, Section 4, of The Public Service Company Law the burden is upon the complainants to show that the rate is unreasonable.

[fol. 17] It is our opinion that respondents' position as to the burden of proof is untenable. The facts are that the rates complained of became State rates and amenable to the Public Service Company Law only upon filing with this Commission effective March 1, 1920. Prior thereto and during the period of Federal control they were Federal rates and not State rates. The complaint having been filed prior to the date when they became State rates and subject to our jurisdiction the burden of proof is upon the respondents.

The complainant contends that these rates, established by authority of General Order No. 28 of the Director General, are unreasonable because they were established as part of a scheme to raise revenue to meet the cost of operating the railroads of the United States as a unit regardless of the cost of any particular movement or the value of the particular service rendered, or the relation to similar commodities transported under substantially the same conditions. Further, a rate constructed as part of a general plan to increase operating revenues while the roads were being operated as a unit, may, and probably will not be reasonable after the return of the railroads to their respective owners. Bell Telephone Company's application, 6 Penna. Corp. Reporter, p. 466. The evidence in the case before the Interstate Commerce Commission, 58 I. C. C. 124-129, which it was agreed by counsel shall be considered in evidence in this case, shows that the defendants practically abandoned their contention that the rate of $1.10 was properly constructed under General Order No. 28 and introduced evidence to establish that said increase was reasonable per se.

The complainants further contend that the testimony "is of no value because it does not show any change in the circumstances which were before this Commission in C. D. No. 1089, except there is [fol. 18] a general statement that operating costs have increased"; the exhibits introduced by the defendants in that case are of no probative value because the rates shown are the result of the same order and are arbitrary; the extent of movements is not shown except that they were substantial.

Should the rate structure established by General Order No. 28 be recognized, complainant argues that the rate should be but $1 by the correct application of that order to the rate in effect on May 25, 1918, as determined by this Commission. The contention of respondents

that the rate determined by The Public Service Commission was the subject of litigation between the parties and the rate used had not been declared illegal because the Supreme Court of Pennsylvania had not (at that time) decided the question, is answered by the statement that the order of the Commission and the judgment of the Court establish the legality of the rate, the case having been decided April 12, 1920, New York and Pennsylvania Co. v. New York Central Railroad Co., 267 Pa., 64.

Respondents stress complainant's testimony that if General Order No. 28 is properly applied complainant is satisfied. The exhibits, respondents contend, establish the reasonableness of the rate by comparison with other rates within the same general territory for corresponding distances, which show that the rate complained of is no higher than any rate for an equal distance and is lower than most of the rates in this region. The rate is consistent with the general scheme of rates applying in this region, and in fact is lower than most of the rates in the region. The operating difficulties on this portion of the road are also dwelt upon.

The record and the Commission's tariff file clearly establish the fact that the only changes made in the rates here in issue during Federal control from those in effect just prior to Federal control [fol. 19] were in pursuance of General Order No. 28 of the Director General. The legality and necessity of that order were at least tacitly acknowledged by this Commission in that by Special Permission No. 2367 of August 10, 1920, the increases allowed by Ex Parte 74, 58 I. C. C., 220-260, which were superimposed upon those made under General Order No. 28 were permitted. Public Service Commission et al. v. Erie Railroad Company, C. D. Nos. 3724 and 3739. It is also established of record that in applying the formula prescribed by that order the rate which this Commission had determined and which was in effect was ignored and instead the rate theretofore in effect and which had been cancelled was used as the base.

The increase of 15 cents per ton therein referred to was authorized by our order, hereinbefore referred to, which shows that the respondents reached a solution satisfactory to them that the increase should be added to the through rate and should accrue 10 cents per ton to the New York Central Railroad and five cents per ton to the Pennsylvania Railroad. The respondents' officials, then under the direction of the Director General, were, therefore, fully aware that the increase of 15 cents per ton had been made and were not justified in disregarding the rates established by our order.

The expensive operating conditions and the comparisons of rates in the same general territory were before us in the original case and the increased costs which have since prevailed are presumed to be met by the general increases designed for that especial purpose.

Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August [fol. 20] 25, 1920, both inclusive, should be $1 per 2,240 pounds,

and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40 proportioned between them as they shall agree, failing which the Commission will determine the division.

Upon the presentation of a petition accompanied by the supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

8/17/21.

[fol. 21] EXHIBIT "B" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Order

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now to-wit, August 16, 1921, It Is Ordered: That the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, within fifteen (15) days from the date of the service of this order, severally file, post and publish, effective upon one day's notice to the public and this Commission, tariff schedules which will provide a through rate on bituminous coal in carloads from the Munson District and Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, of $1.40 per 2,240 pounds.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest, Jno. G. Hopwood, Secretary. (Seal.)

[fol. 22] EXHIBIT "C" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY

Order

It appearing to The Public Service Commission of the Commonwealth of Pennsylvania that a variance exists between the Commission's report of August 16, 1921, in the above entitled complaint, and its order based thereon, with respect to the time within which the New York Central Railroad Company, and the Pennsylvania Railroad Company should file the respective tariff schedules therein ordered to be filed by said respondents:

Now, to-wit, August 29, 1921, It is Ordered: That the order of the Commission of August 16, 1921, in the above-entitled complaint, be and the same is hereby amended so that the tariff schedules therein ordered to be filed by the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, pursuant to said report and order, shall be severally filed within thirty days from the date of the service of the report and original order.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 23] EXHIBIT "D" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY

Order

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition of the New York

Central Railroad Company, and the Pennsylvania Railroad Company, for rehearing, and the matters and things involved having been fully considered:

Now, to-wit, September 6, 1921, It Is Ordered: That the petition for rehearing filed in this case be and the same is hereby refused, and the report and order of the Commission of August 16, 1921, as amended by the order of August 29, 1921, be and the same is hereby affirmed.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 24] EXHIBIT "E" TO STATEMENT OF CLAIM

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Complaint Docket, No. 3206

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY

Supplemental Report and Order

By the COMMISSION:

The Commission has heretofore found and determined that the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the Munson District and the Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, is $1.40 per gross ton. By orders dated August 16, 1921, and August 29, 1921, the Commission directed the respondents to severally file, post and publish, effective upon one day's notice to the public and the Commission, tariff schedules which will provide a through rate on bituminous coal, in carloads, from the Munson District and Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, of $1.40 per 2,240 pounds. The report, which is a part of said orders, directed that the respondents shall proportion the rate between them as they shall agree, failing with the Commission will determine the division.

It appearing that the respondents have been unable to agree as to the proportions of the through rate which shall be published by them [fol. 25] severally, and an informal conference between them and representatives of the Commission having failed to bring about an

agreement, and the New York Central Railroad Company having tendered for filing, in pursuance of said orders, Supplement No. 3 to P. S. C.—Pa. N. Y. C. No. C-63, Joint Local and Proportional Coal Tariff No. 592, which purports to make effective a rate of 97 cents per 2,240 pounds from mines in the Munson and Hawk Run Districts to Bald Eagle Junction (proportional), which with the Pennsylvania Railroad Company's rate of 56 cents per 2,240 pounds from said junction to Lock Haven, results in a through rate of $1.53 per gross ton, the respondents, because of their inability to agree upon the apportionment of the through rate, have failed of compliance with said orders of the Commission; and, therefore,

Now, to-wit, October 18, 1921, It is ordered: That the New York Central Railroad Company and the Pennsylvania Railroad Company, respondents, within ten days from the date of the service of this order, file, post and publish, effective upon one day's notice to the public and this Commission, a joint tariff which will provide a joint through rate on bituminous coal, in carloads, from the Munson District and the Hawk Run District, on the New York Central Railroad, to Lock Haven, Pennsylvania, on the Pennsylvania Railroad, via Bald Eagle Junction (Mill Hall Junction), of $1.40 per 2,240 pounds.

The Commission will upon petition of either party determine the just and reasonable division of the joint rate.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: Jno. G. Hopwood, Secretary. (Seal.)

[fol. 26] Exhibit "F" to Statement of Claim

The Public Service Commission of the Commonwealth of Pennsylvania

Complaint Docket, No. 4738

New York and Pennsylvania Company

vs.

The New York Central Railroad Company, The Pennsylvania Railroad Company

Report of the Commission

By the Commission:

In New York and Pennsylvania Company vs. The New York Central Railroad Company et al, C. D. 3206 (P. U. R. 1921 E p. 80), the Commission determined that the just and reasonable through rate for the transportation of bituminous coal from the Muncy District and the Hawk Run District on the New York Cen-

tral Railroad to Lock Haven, Pa., was $1.00 per 2,240 pounds for the period March 1 to August 25, 1920, and effective August 26, 1920, and thereafter $1 40 per 2,240 pounds. By subsequent order, because the respondents could not agree as to the proportions of the through rate, the Commission directed the publication of the through rate of $1.40 as a joint rate. The Commission's order was duly complied with. There was no appeal taken from either of these orders.

On February 6, 1922, the complainant filed the petition now before us for reparation for the charges paid in excess of the rates determined by the Commission. The parties are agreed as to the amount of the charges paid in excess of the rates found and determined by the Commission, i. e. $5,484.41 for the period March 1 to August 31, 1920, and $16,708.40 for the period subsequent to [fol. 27] August 31, 1920. As to the latter period the respondents' position is definitely stated in brief of argument submitted:

"The defendants do not at this time contest the conclusion of this Commission as to the re-sonableness of the rates applicable to complainant's shipments moving subsequent to September 1, 1920, and and they do not contest the power of this Commission to award reparation on such shipments."

As to the period covered by Federal Guaranty its position is equally definite:

"They do, however, contest both the validity of the Commission's decision in case No. 3206 and its power to award reparation in the present case with respect to shipments moving between March 1, 1920, and August 31, 1920, and these are the issues to be considered in this brief." * * *

"It is the defendants' position, first, that since the rates attacked were in effect on Feb. 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in Case No. 3206, insofar as it purported to effect a reduction in the rates of the defendants for transportation between March 1, 1920, and September 1, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, Second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect, be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted."

[fol. 28] The first of these objections that the rates in effect on March 1, 1920, and during the six months following were lawful rates was advanced by respondent in the original proceeding (P. U. R. 1921E, p. 80 supra) wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were "a collectible rate, or one that may be sued for." Suburban Water Company vs. Borough of Oakmont

268 Pa. 243. The position that the rates in effect on March 1, 1920, were not reviewable by this Commission on complaint is without support in law. In our former opinion we stated:

"The Transportation Act of 1920, Section 208 (a), established the intrastate rates as well as the interstate rates to be effective upon the termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State * * * authority.' Congress enacted the laws which made possible the assumption of control and the operation of the railroads of the country, and logically, must provide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."—P. U. R. 1921E, p. 83, Supra.

[fol. 29] and we see no reason for any change, particularly as the parties have not by appellate proceedings sought modifications or reversal of our conclusions.

The Interstate Commerce Commission considered itself without jurisdiction to determine the reasonableness of intrastate rates in effect after March 1, 1920:

"We are asked to prescribe reasonable and non-prejudicial rates for the future and to grant reparation on shipments moving since August 8, 1918. Except under certain circumstances not here present our jurisdiction over intrastate rates terminated with the relinquishment of the carriers from Federal control. Only the rates in effect during the period of Federal control will be considered." Western Lime & Cement Co. vs. Director General, as Agent, et al. 58 I. C. C. 509.

"Reparations and just and reasonable rates for the future are sought. Our jurisdiction over the intrastate rates assailed, except under circumstances not here presented, is limited to cases falling within the provision of Section 206 (e) of the Transportation Act, 1920. Rates will be stated in cents per 100 pounds." Barnett Oil & Gas. Co. vs. Director General, as Agent, et al. 61 I. C. C. 569.

"The prayer is for just and reasonable rates for the future and for reparation on all shipments made after the filing of the Complaint. Our jurisdiction over intrastate rates, except under circumstances not here present, is limited to cases falling within the provisions of Section 206 (e) of the Transportation Act, 1920." Prince-Johnson Limestone Co. vs. Director General, as Agent, et al. 61 I. C. C. 602.

As to the contention that the rate determined by this Commis-
[fol. 30] sion effect a reduction in a rate prior to September 1, 1920, and that the approval thereof by the Interstate Commerce Commission has not been had, it must be borne in mind that our report and order were issued on August 16, 1921, which made it impossible to secure prior approval and that the Interstate Commerce Commission (March 13, 1922) concluded that it is without jurisdiction to pass upon claims for reparation arising from intrastate movements during the guaranty period and promulgated the following Conference Ruling:

"Voted that Section 208 (a) of the Transportation Act 1920 does not authorize the Commission to award reparation, or consent to an award of reparation made by a state commission, on intrastate shipments which moved during the guaranty period, March 1 to September 1, 1920."

On and after March 1, 1920, all intrastate rates became subject to the jurisdiction of the States and the Interstate Commerce Commission refused to consider any and all cases concerning state rates after that date, except those involving discrimination against interstate commerce and reductions proposed to become effective prior to September 1, 1920.

It, of course, cannot be contended that the Interstate Commerce Commission in the first instance had jurisdiction to award reparation on intrastate traffic during the guaranty period. Under any interpretation of the Transportation Act the State Commissions must take the initiative. Unless it be concluded that the complainantt is wholly without means of redress, the State Commission must act; and now that the Interstate Commerce Commission disclaims authority in the premises, it becomes of more importance that this Commission shall fulfill the obligation imposed by its own organic act. A somewhat similar situation arose in the Public Service Com-
[fol. 31] mission of the Commonwealth of Pennsylvania et al., vs. Erie Railroad Company, C. D. Nos. 3724 and 3739 (9 P. C. R. 245) and in subsequent reparation proceedings (Mansfield Dairy Company vs. Erie Railroad Company C. D. No. 4189, Charles McDowell vs. Erie Railroad Company C. D. No. 4161, Decker & Cook vs. Erie Railroad Company C. D. No. 4162) where similar conclusions were reached.

In view of the possiblity of subsequent litigation and in justice to the complainant and the respondents, two orders for reparation will issue, one for the guaranty period and the other for the period following.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

[fol. 32] EXHIBIT "G" TO STATEMENT OF CLAIM

Complaint Docket, No. 4738

NEW YORK AND PENNSYLVANNIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPAN, THE PENNSYLVANIA RAILROAD COMPANY

Order No. 1

(For the Period March 1 to August 31, 1920)

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition for reparation and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having found and determined by its report and order dated August 16, 1921, in Complaint Docket No. 3206, the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the mines in the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive, to be $1.00 per 2,240 pounds, and for the period August 26, 1920, to August 31, 1920, both inclusive, to be $1.40 per 2,240 pounds, the Commission now finds and determines that the rates of $1.10 and $1.54 per 2,240 pounds, respectively, charged the complainant for the transportation of bituminous coal between the points and during the periods above mentioned were unjust and unreasonable and contrary to law, by reason whereof the complainant is entitled to reparation in the sum of Five Thousand Four Hundred and Eighty-four and 41/100 ($5,484.41) Dollars, for damages sustained which is hereby accordingly awarded, with interest thereon from the date of the improper collection to July 1, 1922, which is found to be Six Hundred Eighty-eight and 56/100 ($688.56) Dollars.

Now, to-wit, June 20, 1922, it is ordered: That the said New York Central Railroad Company, and the Pennsylvania Railroad Company, respondents, be and are hereby directed to pay to the New York and Pennsylvania Company, complainant, within fifteen (15) days from the date of the service of this order, the sum of Six Thousand One Hundred Seventy-two and 97/100 ($6,172.97) Dollars, as reparation as above awarded.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

[fol. 33] EXHIBIT "H" TO STATEMENT OF CLAIM

Complaint Docket, No. 4738

NEW YORK AND PENNSYLVANIA COMPANY

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY

Order No. 2

(For the Period September 1, 1920, and Thereafter)

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition for reparation and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having found and determined by its report and order dated August 16, 1921, in Complaint Docket No. 3206, the just and reasonable through rate for the transportation of bituminous coal, in carloads, from the mines in the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad on and after September 1, 1920, to be $1.40 per 2,240 pounds, the Commission now finds and determines that the rate of $1.54 per 2,240 pounds, charged the complainant for the transportation of bituminous coal between the points above mentioned on and after September 1, 1920, was unjust and unreasonable and contrary to law, by reason whereof the complainant is entitled to reparation in the sum of Sixteen Thousand Seven Hundred Eight and 40/100 ($16,708.40) Dollars, for damages sustained which is hereby accordingly awarded, with interest thereon from the date of the improper collection to July 1, 1922, which is found to be One Thousand Two Hundred Sixty-nine 77/100 ($1,269.77) Dollars.

[fol. 34] Now, to-wit, June 20, 1922, it is ordered: That the said The New York Central Railroad Company, and The Pennsylvania Railroad Company, respondents, be and are hereby directed to pay to the New York and Pennsylvania Company, complainant, within fifteen (15) days from the date of the service of this order, the sum of Seventeen Thousand Nine Hundred Seventy-eight and 17/100 ($17,978.17) Dollars, as reparation as above awarded.

The Public Service Commission of the Commonwealth of Pennsylvania. (Signed) Wm. D. B. Ainey, Chairman.

Attest: (Signed) Jno. G. Hopwood, Secretary. (Seal.)

To the within defendants:

You are required to file an Affidavit of Defense to this Statement of Claim within fifteen days from the service hereof.

T. R. White.

All papers to be served on B. F. Geary, Attorney for Plaintiff, No. 132 E. Water St., Lock Haven, Pa.

[File endorsement omitted.]

[fol. 35] In Common Pleas Court of Clinton County

Summons and Sheriff's Return

The Commonwealth of Pennsylvania to the Sheriff of Clinton County, Greeting:

We command you that you summon the New York Central Railroad Co., a corporation of the State of N. Y., and the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, so that they be and appear before our Court of Common Pleas, to be holden at Lock Haven, in and for said County, on the Fourth Monday of Nov. next, to answer New York and Pennsylvania Company a Corporation of the State of Pennsylvania, in an Action of Assumpsit, and have you there this writ.

Witness Hon. E. H. Baird, President Judge of our said Court, at Lock Haven, the 19th day of Oct. A. D., 1922.

Geo. G. Hickoff, Prothonotary. (Seal.)

Now, October 21, 1922, served the within Summons in Assumpsit together with Statement of Claim, upon the New York Central Railroad Company, a corporation, by handing true and correct copies of the within writ to I. H. Kennedy, its Agent, at its station, at Castanea, Clinton County, Pa. and making known to him the contents thereof. Upon inquiry thereat, the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk — other Executive Officer was not found in the County of Clinton.

Same date, served same writ upon the Pennsylvania Railroad Company, a corporation, by handing true and correct copies of the within writ to D. R. Goodlander, its Agent, at its station, at Lock Haven, Clinton County, Pa., and making known to him the contents thereof.

Upon inquiry thereat, the residence of the President, Secretary, Treasurer, Cashier, Chief Clerk or other Executive Officer was not found in the County of Clinton.

So ans.—

F. M. Johnston, Sheriff.

Endorsement: No. 5, Jany. Term 1923.—Summons in Assumpsit. —New York and Pennsylvania Company vs. The New York Central Railroad Co. and the Pennsylvania Railroad Company.—Shff. fee $6.00.—B. F. Geary, Pl'ff's Att'y.

[fol. 36] In Court of Common Pleas of Clinton County

[Title omitted]

Appearance of Counsel—Filed Nov. 27, 1922

Enter our appearance for the Pennsylvania Railroad Company, above named defendant.

M. E. Haggerty, McCormick & Hipple, Attorneys for Pennsylvania Railroad Company.

[File endorsement omitted.]

[fol. 37] In Court of Common Pleas of Clinton County

[Title omitted]

Appearance of Counsel—Filed Nov. 27, 1922

Enter our appearance for the New York Central Railroad Company, above named defendant.

M. E. Haggerty, McCormick & Hipple, Attorneys for New York Central Railroad Company.

[File endorsement omitted.]

[fol. 38] In Court of Common Pleas of Clinton County

[Title omitted]

Affidavit of Defense of the New York Central Railroad Company, One of the Defendants Above Named, to the Plaintiff's Statement of Claim.—Filed Nov. 27, 1922

The New York Central Railroad Company, one of the defendants above named, answering the Plaintiff's Statement of Claim, or so much thereof as it is advised is material for it to answer, says that it has a just, full and true defense to the claims of the plaintiff in the above stated action, the nature and character of which are herein set forth in its affidavit of defense.

1. It is a consolidated corporation existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, having its principal office in the City of Albany and State of New York, and is and, at the times hereinafter described, was engaged as a common carrier in the transportation of freight and passengers between points in the State of Pennsylvania and in interstate commerce between points in the State of Pennsylvania and points in other States.

It admits the allegations contained in paragraph 1 of Plaintiff's Statement of Claim.

[fol. 39] 2. It admits that the freight rates charged and collected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to February 29, 1920, as alleged in said paragraph 2; but avers that prior to February 29, 1920, the lines of the defendants were under Federal control and said rates were charged and collected by the President of the United States through the Director General.

3. As to paragraph 3 of the Plaintiff's Statement of Claim, it admits that prior to February 29, 1920, the lines of the New York Central Railroad Company were under Federal control, and that on March 1, 1920, pursuant to the terms of an Act of Congress known as the Transportation Act, 1920, 41 Stat., L., 456, Federal control was terminated in certain respects; but this defendant alleges that by the provisions of Section 208 (a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect until thereafter changed by State or Federal authority, or pursuant to authority of law, but prior to September 1, 1920, no such rate was permitted to be reduced unless with the approval of the Interstate Commerce Commission.

4. It admits the allegation contained in paragraph 4 of the Plaintiff's Statement of Claim.

5. As to the allegations contained in paragraph 5 of Plaintiff's Statement of Claim, it admits that on August 26, 1920, by tariffs duly filed, the through rate for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, was increased from $1.10 to $1.54, which rate was thereafter collected; but it avers that this increase in the through rate was not accomplished by the establishment of a joint rate of $1.54, as [fol. 40] alleged in paragraph 5 of the Plaintiff's Statement of Claim, but by increases in the separately published rates of The New York Central Railroad Company and The Pennsylvania Railroad Company—the rate of The New York Central Railroad Company from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction being increased to 98 cents, and the rate of The Pennsylvania Railroad Company from Bald Eagle Junction to Lock Haven, Pennsylvania, being increased to 56 cents per ton.

6. As to the allegations contained in paragraph 6 of the Plaintiff's Statement of Claim, it admits that proceedings were had, as alleged in said paragraph, and that the Public Service Commission of Pennsylvania made the reports and orders which are attached to the Plaintiff's Statement of Claim and marked "Exhibits 'A,' 'B,' 'C,' 'D' and 'E,'" but in none of these reports or orders is to be found any order with respect to the rates which were in effect, as alleged in the Plaintiff's Statement of Claim, during the period from March 1, 1920, to September 1, 1920. This defendant avers that, while the Public

Service Commission purported to find that the just and reasonable rate for the through movement of coal from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, for the period from March 1, 1920, to August 25, 1920, was $1.00 per ton, and from August 26, 1920, to September 1, 1920, was $1.40 per ton, nevertheless the Commission's finding as to a just and reasonable rate during the period from March 1, 1920, to September 1, 1920, was nugatory and of no avail, and the said finding is of no effect and in violation of Section 208 (a) of the Transportation Act, 1920. This defendant further avers that while the finding, as stated above, was made by the Public Service Commission in the reports referred to, it entered no order at that time with respect to the matter, and [fol. 41] thereafter issued no order save and excepting the order of reparation which is the subject of this suit, and which is shown in the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated "Exhibit G."

7. It denies the allegations contained in paragraph 7 of the Plaintiff's Statement of Claim, and on the contrary it avers that said rates were just and reasonable and were not in violation of the Public Service Company Law.

8. It admits that no appeal was taken by the defendant from the report and orders of the Public Service Commission, referred to in paragraph 8 of the Plaintiff's Statement of Claim, but it avers that in the said report and orders, no order was made with respect to the reasonableness of the rates in effect between March 1, 1920, and September 1, 1920, and no order of reparation in respect thereto. The only order made by the Commission with regard to the rates in effect during this period was the order of reparation hereinbefore referred to, which is included as part of the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated "Exhibit G."

9. As to the allegations contained in paragraph 9 of the Plaintiff's Statement of Claim, it admits that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission of Pennsylvania purported to order and find reasonable; but it denies that the rates actually paid by the plaintiff were in excess of reasonable rates.

[fol. 42] 10. It has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in paragraph 10 of the Plaintiff's Statement of Claim, and if said allegation is deemed material, this defendant prays that the plaintiff be required to make proper proof thereof.

11. As to the allegations contained in paragraph 11 of the plaintiff's Statement of Claim, it admits that proceedings were had, as alleged therein, and that the Public Service Commission of Penn-

sylvania made the report and order herein described; but it alleges that so much of the Commission's report as purported to hold that the rates charged by the defendants on shipments moving between March 1, 1920, and August 31, 1920, were unreasonable and Order No. 1 attached to Plaintiff's Statement of Claim as "Exhibit G" were in violation of Section 208 (a) of the Transportation Act, 1920, and therefore are of no effect.

12. It admits the allegations contained in paragraph 12 of the Plaintiff's Statement of Claim.

13. It admits the allegations contained in paragraph 13 of the Plaintiff's Statement of Claim.

14. For a separate and complete defense to the Plaintiff's Statement of Claim, it avers that its rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission Re-[fol. 43] ports, page 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which report is hereto attached, made part hereof and marked "Exhibit A," and to which proceeding reference is hereby specially made with the same effect as if full copies thereof had been attached hereto; it alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208(a) thereof; it alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. It alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as "Exhibit G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore null and void.

16. It alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law.

[fol. 44] Wherefore, the defendant avers that it is not liable to the plaintiff in any amount on account of the matters and things set forth in Plaintiff's Statement of Claim. All of which defendant avers is true and correct and defendant expects to be able to prove the same by competent evidence at the trial of said cause.

The New York Central Railroad Co., by G. H. Ingals, Its Vice-President.

Jurat showing the foregoing was duly sworn to by Geo. H. Ingalls omitted in printing.

[fol. 45] No. 28868, Series B, Form 2

STATE OF NEW YORK,
County of New York, ss:

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said County, do hereby certify, that said Court is a Court of Record, having by law a seal; that C. A. Halpin, whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public, acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, and that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York in the County of New York, this 22nd day of November 1922.

James A. Donegan, Clerk.

[fol. 46] EXHIBIT "A" TO AFFIDAVIT

187162—20.
Washington; Government Printing Office; 1920.

6263

INTERSTATE COMMERCE COMMISSION

No. 10729

NEW YORK & PENNSYLVANIA COMPANY

v.

DIRECTOR GENERAL, as Agent New York Central Railroad Company, et al.

No. 10729

NEW YORK & PENNSYLVANIA COMPANY

v.

DIRECTOR GENERAL, as Agent New York Central Railroad Company, et al.

Submitted April 10, 1920. Decided June 18, 1920.

Rates of $1.10 per gross ton for the transportation intrastate of bituminous coal, carloads, from the Snow Shoe, Grass Flat, Munson, and Hawk Run Districts of Central Pennsylvania applicable via the lines of the New York Central and Pennsylvania Railroads to Lock Haven Pa., not found to have been unreasonable or otherwise unlawful. Complaint dismissed.

E. Bartram Richards and Thomas Raeburn White for Complainant.

Parker McCollester and John M. Sternhagen for defendants.

[fol. 47] Report of the Commission

Division I, Commissioners McChord, Meyer, and Eastman

MEYER, Commissioner:

This case was made the subject of a proposed report. Exceptions thereto were filed by the complainant and oral argument had.

Complainant is a corporation engaged in the manufacture of pulp and paper with mills at Lock Haven and Johnsonburg, Pa., and Willsboro, N. Y. At the Lock Haven mill it consumes yearly approximately 120,000 gross tons of bituminous coal. Alleging violation of Section 1 of the Act to regulate commerce and Section 10

of the Federal control Act, unjust discrimination, and undue prejudice in contravention of the first-named Act, the complaint, filed June 26, 1919, assails the current proportional rate of 70 cents per gross ton of the New York Central Railroad Company applied to the transportation of bituminous coal, in carloads, from mines located on the lines of that company in Snow Shoe, Grass Flat, Munson, and Hawk Run Districts of the Clearfield region of Central Pennsylvania to Bald Eagle Junction, Pa., also the combined through rates from those districts to Lock Haven, of $1.10 per gross ton, composed of that proportional rate and the local rate of the Pennsylvania Railroad Company of 40 cents per gross ton thence to Lock Haven, to the extent that such through rates exceed $1 per gross ton. Complainant seeks the restoration of the rate of $1, in effect immediately prior to July 11, 1919, and reparation upon all shipments moving since. While, as just stated, the proportional rates of the New York Central are attacked complainant's sole concern is that the through rates shall not exceed the amount stated and it is immaterial to it what rates aggregating that amount are received [fol. 48] by each of the carriers. As rates for the future are no longer subject to our jurisdiction, reparation alone is involved.

The traffic is originated by the New York Central, which transports it from 31 to 55 miles, dependent upon the location of the mine, to what is called in its tariffs Bald Eagle Junction; in the tariffs of the Pennsylvania, Mill Hall. The distance from this junction of the two carriers to Lock Haven is 4.2 miles, but the paper mill of the complainant is distant but 3 miles from the junction.

All the coal here considered originated in the Munson and Hawk Run Districts, the rates are grouped, and have been the same since June 25, 1918. For the purpose of this report, therefore, the rates from those two districts disclose the rate situations. Rates herein are stated in amounts per ton of 2,240 pounds.

On July 11, 1919, the proportional rate of the New York Central was increased from 60 to 70 cents; the local rate of the Pennsylvania was unchanged; hence the through rate was correspondingly increased. The rate of 60 cents, effective June 25, 1918, defendants assert was, through clerical error, 10 cents too low. Complainant contends that the rate of 70 cents, effective July 11, 1919, was the result of an erroneous application of General Order No. 28 of the Director General of Railroads and the increase was superimposed upon an illegal rate. Complainant's case rests on this contention. No testimony directed to any other issue was submitted by complainant, it being urged that incorrect application of the general order in respect of the rates here considered and correct application of the order to other rates constitutes violation of the provisions of the acts invoked.

[fol. 49] The following tabular statement in chronological order shows the rates from September 19, 1916, to date:

Date	Munson and Hawk Run to Bald Eagle Junction	Bald Eagle Junction to Lock Haven	Through rates
	Cents	Cents	Cents
Sept. 19, 1916	45	20	65
Sept. 20, 1916	55	20	75
July 1, 1917	65	35	100
Aug. 24, 1917	45	35	80
Dec. 24 1917	55	25	80
June 25, 1918	60	40	100
July 11, 1919	70	40	110

The pertinent portions of General Order No. 28, issued May 25, 1918, as supplemented June 12, 1918, are:

* * * all existing freight rates * * * be increased or modified, effective June 25, 1918, * * * to the extent and in the manner indicated and set forth in the "Exhibit" hereto attached * * *

* * * * * * *

Coals:

* * * * * * *

Where rate is 50 to 99 cents per net ton—20 cents.

* * * * * * *

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated, and to the rates so constructed the above increases shall now be added.

[fol. 50] The order provided that in applying rates per ton fractions should be disposed of by omitting amounts of less than 5 cents; amounts of 5 cents or greater but less than 10 cents to be increased to 10 cents.

Prior to May 21, 1916, the rate from the Munson and Hawk Run Districts to Lock Haven was 95 cents for Pennsylvania delivery, made up of the 45-cent proportional rate to Bald Eagle Junction and 50 cents beyond. During this period the rate from these mines was 93 cents for New York Central delivery known as Lock Haven but outside the city limits and 2 miles from complainant's plant. On the above date, the rate of the Pennsylvania Railroad was reduced to 20 cents, resulting in a through rate of 65 cents, which was lower than the rates to intermediate points and lower than the rate for New York Central delivery. On September 20, 1916, the rate to Bald Eagle Junction was made by the New York Central 55 cents and the through rate became 75 cents. At the same time

the rate for New York Central delivery was reduced to 75 cents. On June 15, 1917, the rate to Bald Eagle Junction was made 65 cents and the rate beyond of the Pennsylvania Railroad 35 cents, the through rate being $1. At the time of the increase in the rate to Bald Eagle Junction to 55 cents, a complaint was filed by this complainant with the Public Service Commission of Pennsylvania, attacking the rate of the New York Central; and on July 24, 1917, that commission issued its report and order holding that it had jurisdiction over the through rate although the Pennsylvania Railroad was not a party defendant, but requiring the New York Central to restore the rate of 45 cents for the reason that it had not sustained the burden of proof placed upon it by law. The 45-cent rate was restored August 24, 1917. Shortly thereafter the New York Central applied to the Public Service Commission for authority to [fol. 51] increase its proportional rate by 15 cents to align the state rates with interstate rates permitted to be increased in The Fifteen Per Cent. Case, 45, I. C. C., 303. Complainant and other consumers of coal at Lock Haven protested against the granting of the permission for the reason that the through rate had already been increased 15 cents by the increase in the local rate of the Pennsylvania Railroad. The parties agreed with the approval of the commission to increase the proportional rate of the New York Central from 45 to 55 cents, and to reduce the local rate of the Pennsylvania Railroad from 35 to 25 cents. In other words the through rate was maintained without change, the increase of 15 cents being apportioned between the two carriers. Subsequently complainant filed a supplemental complaint with the Public Service Commission asking an award of reparation against the New York Central on shipments which had moved at the rate which the commission had found not justified. Reparation was awarded and the award has been sustained by the courts of Pennsylvania.

On June 25, 1918, an increase of 22.4 cents was added to the 80-cent through rate, under General Order No. 28, and the fraction dropped, making the through rate $1, the rate to Bald Eagle Junction being 60 cents and the rate beyond 40 cents. On July 1, 1919, the alleged error in making the increase of June 25, 1918, was corrected by adding to the through rate of 75 cents, in effect on June 1, 1917, 15 cents, and then adding 22.4 cents, as permitted by General Order No. 28, and dropping the fraction, making the through rate $1.10.

Complainant urges that the first step in applying the general order is to find the existing freight rate in effect May 25, 1918, at the time the general order was issued. The through rate on that date was 80 cents. The second step, in the view of the complainant, [fol. 52] is to determine whether or not the rate in effect on that date had been increased since June 1, 1917. The through rate was increased on July 1, 1917, when the Pennsylvania increased its local rate to 35 cents, and that increase was continued in the through rate on December 24, 1917, although apportioned between the two carriers. Therefore, in the view of the complainant there was no warrant in the general order to increase the rate existing on May

25, 1918, by 15 cents. In other words, it is the complainant's contention that the only use to which the rate in effect on June 1, 1917, could be put in the application of the general order was to determine whether the rate on May 25, 1918, embraced any or all of the increase of 15 cents.

It is also the contention of the complainant that the — reparation order operated to put the complainant in the position of never having paid the tariff rate of June 1, 1917, but only the rate which should have been in effect at that time. By that order the Commission held, in effect, that the tariff rate of June 1, 1917, could not, under any circumstances, be sustained, and that the complainants should be in the position in which they would have been if they had never been required to pay that rate.

Defendants contend that the order of the Public Service Commission requiring the New York Central to restore its proportional rate in effect September 19, 1916, can not be res adjudicata and conclusive upon this Commission in connection with an attack upon the through rate from the mines to Lock Haven; that the increases authorized under General Order No. 28 were to be computed with reference to rates in effect June 1, 1917, and that the through rate in effect on that date had not been increased 15 cents.

Defendants also take the position that irrespective of General [fol. 53] Order No. 28 the proper issue before us is whether or not the present rate of $1.10 is, as alleged, in violation of the acts invoked.

The only issue which is properly before us is the justness and reasonableness of the rate which is assailed, and the manner in which the rate was arrived at is only one of the elements to be considered in determining the issue.

The undue prejudice alleged is predicated on the contention that a greater increase was made in the rates in issue than in other rates increased under the general order.

Comparison is made by defendants of the rate of $1.10 from the Munson and Hawk Run Districts to Lock Haven over a two-line haul, for an average distance of 56 to 60 miles, with rates to Lock Haven from mines on the Pennsylvania Railroad of $1.10 from mines on the Snow Shoe branch, distances of 43 to 45 miles, and $1.50 from Osceola Mills, a distance of 74 miles. It is further shown that the rate to Lock Haven reasonably compares with rates from mines on the New York Central and the Pennsylvania Railroad to other points in the same territory for approximately equal distances.

On behalf of defendants, it is also urged that adverse operating conditions are encountered on the line over which the rate assailed applies, and that the grades on this line are so severe that it is not used for through traffic and that the traffic handled is comparatively small in amount.

It is contended by complainant that the comparisons of defendant have no weight for the reason that the reasonableness of the rate to Lock Haven in effect prior to the general order has been determined by the Public Service Commission of Pennsylvania.

The rate which was ordered reduced by that commission was the

proportional rate of the New York Central to Bald Eagle Junction, [fol. 54] and its finding was that the defendant had not sustained the burden of proof by showing that the rate was reasonable.

We have before us the through rate of the two carriers, and a determination that the reasonableness of one factor of such through rate has not been justified is not conclusive of the reasonableness of the through rate.

Upon consideration of the whole record, we are of opinion and find that the rates attacked were not unreasonable or otherwise unlawful as alleged.

An order dismissing the complaint will be entered.

Order

At a Session of the Interstate Commerce Commission, Division 1, Held at Its Office, in Washington, D. C., on the 18th Day of June, A. D. 1920.

No. 10729

New York & Pennsylvania Company

v.

Director General of Railroads, as Agent New York Central Railroad Company, et al.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Division 1.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 55] In Court of Common Pleas of Clinton County

[Title omitted]

Affidavit of Defense of the Pennsylvania Railroad Company, One of the Defendants Above Named, To the Plaintiff's Statement of Claim—Filed Nov. 27, 1922

Walter Thayer, General Coal Freight Agent of The Pennsylvania Railroad Company, defendant in the above entitled cause, being duly

sworn, deposes and says that said defendant has a just, full, and true defense to the whole of the plaintiff's claim of the following nature and character, all of which defendant expects to prove at the trial of this case:

1. This defendant is a corporation existing under and by virtue of the laws of the State of Pennsylvania, having its principal office in the City of Philadelphia and State of Pennsylvania, and is and, at the times hereinafter described, was engaged as a common carrier in the transportation of freight and passengers between points in the State of Pennsylvania and in interstate commerce between points in the State of Pennsylvania and points in other States. It admits the allegations contained in paragraph 1 of Plaintiff's Statement of Claim.

2. This defendant admits that the freight rates charged and col- [fol. 56] lected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to, February 29, 1920, as alleged in said paragraph 2; but avers that prior to February 29, 1920, the lines of the defendants were under Federal control and said rates were charged and collected by the President of the United States through the Director General.

3. This defendant admits that prior to February 29, 1920, the lines of The Pennsylvania Railroad Company were under Federal control, and that on March 1, 1920, pursuant to the terms of an Act of Congress known as the Transportation Act, 1920, 41 Stat., L., 456, Federal control was terminated in certain respects; but this defendant alleges that by the provisions of Section 208(a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect until thereafter changed by State or Federal authority, or pursuant to authority of law, but prior to September 1, 1920, no such rate was permitted to be reduced unless by and with the approval of the Interstate Commerce Commission.

4. This defendant admits the allegation contained in paragraph 4 of the Plaintiff's Statement of Claim.

5. This defendant admits that on August 26, 1920, by tariffs duly filed, the through rate for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, was increased from $1.10 to $1.54 which rate was thereafter collected; but it avers that this increase in the through rate was not accomplished by the establishment of a joint rate of $1.54, as alleged in paragraph 5 of the Plaintiff's Statement of Claim, but by increases in the separately published rates of The New York Central Railroad Company and the Pennsylvania Railroad Company—the rate of The New York Central Railroad Company from the mines in the Munson [fol. 57] and Hawk Run Districts to Bald Eagle Junction being increased to 98 cents, and the rate of The Pennsylvania Railroad Com-

pany from Bald Eagle Junction to Lock Haven, Pennsylvania, being increased to 56 cents per ton.

6. This defendant admits that proceedings were had, as alleged in said paragraph, and that the Public Service Commission of Pennsylvania made the reports and orders which are attached to the Plaintiff's Statement of Claim and marked Exhibits "A", "B", "C", "D" and "E", but in none of these reports or orders is to be found any order with respect to the rates which were in effect, as alleged in the Plaintiff's Statement of Claim, during the period from March 1, 1920, to September 1, 1920. This defendant avers that, while the Public Service Commission purported to find that the just and reasonable rate for the through movement of coal from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, for the period from March 1, 1920, to August 25, 1920, was $1.00 per ton and from August 26, 1920, to September 1, 1920, was $1.40 per ton, nevertheless, the Commission's finding as to a just and reasonable rate during the period from March 1, 1920, to September 1, 1920, was nugatory and of no avail, and the said finding is of no effect and in violation of Section 208(a) of the Transportation Act, 1920. This defendant further avers that while the finding, as stated above, was made by the Public Service Commission in the reports referred to, it entered no order at that time with respect to the matter, and thereafter issued no order save and excepting the order of reparation which is the subject of this suit, and which is shown in the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated Exhibit "G".

7. This defendant denies the allegations contained in paragraph 7 of the Plaintiff's Statement of Claim, and on the contrary avers that [fol. 58] said rates were just and reasonable and not in violation of the Public Service Law.

8. This defendant admits that no appeal was taken by the defendant from the report and orders of the Public Service Commission, referred to in paragraph 8 of the Plaintiff's Statement of Claim, but it avers that in the said report and orders, no order was made with respect to the reasonableness of the rates in effect between March 1, 1920, and September 1, 1920, and no order of reparation in respect thereto. The only order made by the Commission with regard to the rates in effect during this period was the order of reparation hereinbefore referred to, which is included as part of the Plaintiff's Statement of Claim, constituting pages 26 and 27 thereof, and designated Exhibit "G."

9. This defendant admits that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission of Pennsylvania purported to order and find reasonable; but it denies that the rates actually paid by the plaintiff were in excess of reasonable rates.

10. This defendant has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in paragraph 10 of the Plaintiff's Statement of Claim, and if said allegation is deemed material, this defendant prays that the plaintiff [fol. 59] be required to make proper proof thereof.

11. This defendant admits that proceedings were had, as alleged therein, and that the Public Service Commission of Pennsylvania made the report and order herein described, but it alleges that so much of the Commission's report as purported to hold that the rate charged by the defendants on shipments moving between March 1, 1920, and August 31, 1920, were unreasonable and Order No. 1 attached to Plaintiff's Statement of Claim as Exhibit "G" were in violation of Section 208(a) of the Transportation Act, 1920, and therefore are of no effect.

12. This defendant admits the allegations contained in paragraph 12 of the Plaintiff's Statement of Claim.

13. This defendant admits the allegations contained in paragraph 13 of the Plaintiff's Statement of Claim.

14. For a separate and complete defense to the Plaintiff's Statement of Claim, this defendant avers that the New York Central Railroad Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10, were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit "A." This defendant alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to [fol. 60] be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law.

15. This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit "G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was, therefore, null and void.

16. This defendant alleges that since said Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, was null and void, the plaintiff has no cause of action under Section 5 of Article 5 of the Public Service Company Law.

Wherefore, the defendant, The Pennsylvania Railroad Company, prays that the plaintiff's case may be dismissed and that it may be allowed its reasonable costs in this behalf.

McCormick & Hipple, Attorneys for the Pennsylvania Railroad Company. Henry Wolf Bikle, of Counsel.

[fol. 61] Jurat showing the foregoing was duly sworn to by Walter Thayer omitted in printing.

[fols. 62–69] Exhibit "A" to Affidavit—Omitted; printed side page 46 ante

[fol. 70] [File endorsement omitted.]

[fol. 71] Order to Show Cause—Omitted; printed side page 2 ante

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[fol. 72] In Court of Common Pleas of Clinton County

[Title omitted]

Reasons in Support of Motion for Judgment Against the Pennsylvania Railroad Company, One of the Above-named Defendants, for Want of a Sufficient Affidavit of defense—Filed Jan. 8, 1923.

The Plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceedings against the Pennsylvania Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion:

1. As to paragraph 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31,

of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraph 14-16 of the affidavits of defense, it appears from Exhibits A-D attached to the statement that the Public Service [fol. 73] Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defendants, and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission, and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraph 14-16 of the affidavits of defense, because under Sec. 208(a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208(a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the States relating to intrastate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during the Federal control, again became operative, and the [fol. 74] Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the reparation involved in this proceeding, would be in violation of the Transportation Act, 1920.

T. R. White, B. F. Geary, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 75] IN COURT OF COMMON PLEAS OF CLINTON COUNTY

[Title omitted]

REASONS IN SUPPORT OF MOTION FOR JUDGMENT AGAINST THE NEW YORK CENTRAL RAILROAD COMPANY, ONE OF THE ABOVE-NAMED DEFENDANTS, FOR WANT OF A SUFFICIENT AFFIDAVIT OF DEFENSE—Filed Jan. 8, 1923.

The Plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceeding against the New York Central Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion.

1. As to paragraph- 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission, against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraphs 14-16 of the affidavits of defense, it appears from Exhibits A-D attached to the statement that the Public Service Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defend- [fol. 76] ants and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraphs 14-16 of the affidavits of defense, because under sec. 208, (a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208 (a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the states relating to interstate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during Federal control, again became operative, and the Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the reparation involved in this proceeding, would be in violation of the Transportation Act 1920.

T. R. White, B. F. Gray, Attorneys for Plaintiff.

[fol. 77] [File endorsement omitted.]

[fol. 78] In Court of Common Pleas of Clinton County

[Title omitted]

Opinion—Filed July 23, 1923

The plaintiff in its statement of cause of action avers in substance and in paragraphs consecutively numbered, as follows:

1. That it is a large consumer of bituminous coal which is shipped from the Munson and Hawk Run Districts in Central Pennsylvania over the lines of the defendant, The New York Central Railroad Company, to Bald Eagle Junction, Pennsylvania, and thence over the lines of the defendant, the Pennsylvania Railroad Company, to Lock Haven, Pennsylvania, where plaintiff's mills are located.

[fol. 79] 2. That on and prior to February 29, 1920, the freight rates charged and collected by the defendants on coal so shipped, according to their tariffs, were: by the New York Central 70c. and by the Pennsylvania 40c. per ton of 2,240 pounds.

3. That on and prior to February 29, 1920, the lines of the defendants were under Federal control pursuant to Acts of Congress, and on March 1st, 1920, pursuant to an Act of Congress known as the "Transportation Act, 1920," were restored to their owners, the defendants.

4. That prior to March 1, 1920, the plaintiff filed a complaint with the Public Service Commission of Pennsylvania, alleging that the rates above specified were, and upon re-establishment of State authority thereover would be, unjust, unreasonable, excessive, discriminatory and in violation of the Public Service Company Law of Pennsylvania.

5. That an August 25, 1920, while said proceedings were pending and undetermined, pursuant to general increases which were then permitted, and by tariffs duly filed, defendants increased the

joint rate for said transportation of coal from $1.10 to $1.54 per ton, which thereafter was charged and collected.

6. That answers were filed by defendants to said complaint, hearings had and the Commission made its report on August 17, 1921, and entered orders on August 16, 1921, and August 29, 1921, wherein and whereby it found and ordered that the just and reasonable rate for said through movement of coal for the period from March 1, 1920, to August 25, 1920, was $1.00 instead of $1.10 per ton, and that the just and reasonable rate effective August 26, 1920, was $1.40 instead of $1.54 per ton, and that thereafter defendants [fol. 80] filed a petition for a rehearing which was in due course refused. Copies of the report and orders of the Commission above mentioned and of a Supplemental Report and order dated October 18, 1921, are attached to the plaintiff's statement.

7. That the rates of $1.10 charged from March 1, 1920, to August 25, 1920, inclusive, and of $1.54 after August 26, 1920, were unjust, unreasonable, &c.

8. That no appeal was taken from said report and orders or any of them.

9. That between March 1, 1920, and August 31, 1920, both inclusive, there were shipped to plaintiff over defendants' lines 54,830.34 gross tons of coal, for the transportation of which plaintiff paid defendants freight in excess of reasonable rates as aforesaid the sum of $5,484.41 and during the period from August 31, 1920, until November 3, 1921, when the reduced rates became effective by order of the Commission, 119,406.87 gross tons for the transportation of which plaintiff paid defendants $16,708.40 in excess of said reasonable rates, and that plaintiff and defendants agreed upon these amounts and there is no dispute concerning them.

10. That plaintiff consumed all of the coal so shipped to it on which said excess charges were paid and did not pass on to any other person or corporation the loss sustained by reason of its having paid said unlawful rates.

11. That plaintiff filed its petition for reparation for the excess payments on coal moving as aforesaid, that answers were filed by the defendants, and that the case was so proceeded with that on June 20, 1922, two orders were promulgated by the Commission, one directing the defendants to pay to plaintiff reparation for excess charges on shipments moving between March 1, 1920, and August 31, 1920, in the amount of $6,172.97 (interest having been added) [fol. 81] and one for the period from September 1, 1920, to November 3, 1921, in the amount of $17,978.17. Copies of the report and orders of the Commission are attached to the plaintiff's statement.

12. That defendants paid order No. 2 covering reparation in the amount of $17,978.17.

13. That order No. 1, directing defendants to pay the plaintiff the sum of $6,172.97 has not been paid.

The suit is to recover the amount of Order No. 1 with interest from July 20, 1922.

To the plaintiff's statement the defendants have filed separate affidavits of defense. These affidavits differ slightly in form, but in all material respects they are the same. Although each is made up of sixteen consecutively numbered paragraphs in addition to formal introductions and conclusions, it is clear from a careful reading of the whole of the affidavits of defense that they raise only two questions.

In the seventh paragraph of each the defendant denies the allegations contained in the corresponding paragraph of the statement of claim, and avers that the rates therein mentioned (those established under Federal control) are just and reasonable and not in violation of the Public Service Company Law.

The other defense is based on Section 208 (a) of the Transportation Act, 1920, which it is claimed had the effect of forbidding the Public Service Commission of Pennsylvania to award reparation on shipments moving during the guaranty period created by said Transportation Act, namely March 1st, to September 1st, 1920, which coincides with the period in controversy, without the approval of the Interstate Commerce Commission. This defense appears through-[fol. 82] out the affidavits. In paragraph 2 of their affidavits the defendants admit that the freight rates charged and collected on, and for a considerable period prior to February 29th, 1920, were as alleged in paragraph 2 of the plaintiff's statement of claim, but aver that prior to February 29, 1920, the lines of the defendants were under Federal control and that said rates were charged and collected by the President of the United States through the Director General. In paragraph 3 of their affidavits of defense the defendants allege that by the provisions of Section 208 (a) of the Transportation Act, 1920, the freight rates in effect on its lines on February 29, 1920, were continued in effect thereafter until changed by State or Federal authority, or pursuant to authority of law, but that prior to September 1, 1920, no such rate was permitted to be reduced unless by and with the approval of the Interstate Commerce Commission. In paragraph 6 of their affidavits the defendants aver that the (Public Service) Commission's finding as to a just and reasonable rate during the period from March 1st, to September 1, 1920, was "nugatory and of no avail," of no effect "and in violation of Section 208 (a) of the Transportation Act, 1920." In paragraph 11 of their affidavits the defendants allege that so much of the (Public Service) Commission's report as purported to hold that the rates charged by the defendants on shipments moving between March 1st, 1920, and August 31st, 1920, were unreasonable and order No. 1, attached to plaintiff's statement of claim "were in violation of Section 208 (a) of the Transportation Act. 1920, and therefore are of no effect." In paragraph 14 of the affidavits this defense is elaborated somewhat. We quote this paragraph in the affidavit of the Pennsylvania Railroad Company in full:

"14. For a separate and complete defense to the plaintiff's statement of claim this defendant avers that the New York Central Rail- [fol. 83] road Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10 were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants and that the Interstate Commerce Commission, in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A.' This defendant alleges that by Section 208 (a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission has never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including Section 208 (a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of said rate was not in violation of the Pennsylvania Public Service Company Law."

[fol. 84] The 14th paragraph of the affidavit of defense of the New York Central Railroad Company is substantially the same.

In paragraph 15 of their affidavits of defense the defendants allege

"that order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to the plaintiff's statement of claim as Exhibit "G" would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208 (a) of the Transportation Act, 1920, and was, therefore, null and void."

In paragraph 8 of their affidavits of defense the defendants admit that no appeal was taken from the report and orders of the Public Service Commission in the original proceedings had before it, wherein and whereby the Commission concluded

"that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive, should be $1 per 2,240

pounds, and effective August 26, 1920, * * * $1.40 per 2,240 pounds,"

and declared that

"upon the presentation of a petition accompanied by supporting data, reparation will be awarded for freight charges paid in excess of the rates herein determined."

The plaintiff having obtained a rule to show cause why judgment should not be entered in its favor and against the defendant for want of a sufficient affidavit of defense, and arguments of counsel having [fol. 85] been heard thereon, the case is now before the Court for disposition upon the rule.

In the 9th paragraph of their affidavits of defense the defendants admit that the plaintiff shipped over its lines from the mines in the Munson and Hawk Run Districts to Lock Haven, Pennsylvania, the amounts of coal therein alleged, and that plaintiff paid the freight charges which exceeded, by the amounts alleged, the freight charges which it would have paid under the rates which the Public Service Commission purported to find reasonable.

The first and second of the reasons assigned by the plaintiff for judgment for want of an affidavit of defense are as follows:

"1. As to paragraph- 1-13 of the affidavit of defense, all material questions of fact and law sought to be raised therein have been decided by the Commission, against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

"2. As to paragraph- 14-16 of the affidavit of defense, it appears from Exhibits A-D attached to the statement that the Public Service Commission found the rate in effect, during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and [fol. 86] as no appeal was taken, this finding is conclusive upon the defendants and the right, of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission and its consent obtained, before plaintiff could be entitled to reparation."

Section 31 of Article VI of the Public Service Company Law provides:

"Section 31 * * * Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act."

Section 17 of Article VI of the Public Service Company Law, as amended by an act of June 3, 1915, P. L. 779, provides that:

"Within thirty days after filing of any finding or determination by the Commission, or after the date of service of any order—unless an application for a re-hearing may be pending, and then within thirty days after the refusal of such application—or the entry of an order modifying, amending, rescinding or affirming the original finding, determination or order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court: provided that there shall be no appeal from any order for reparation made by the Commission but the suit may be brought as hereinbefore provided. * * *"

We have said that the affidavits of defense raise only two questions. They really raise but one for the claim that the rates estab- [fol. 87] lished by the Federal Government and in force at the beginning of the guaranty period were the only just, reasonable and lawful rates in effect during the whole of that period, is based solely on the contention that the lower rates found by the Public Service Commission to be the just and reasonable rates are invalid because not approved by the Interstate Commerce Commission. The validity of the action of the Public Service Commission, when, on August 17, 1921, it found the just and reasonable rates to be as stated in its report of that date, is, therefore the only matter in controversy. Such a finding necessarily involved the determination that the rates in effect immediately prior to the guaranty period would be unjust and unreasonable if continued into that period. Did it also neccesarily involve and include the determination by the Public Service Commission of its right to prescribe lower rates than those theretofore established by Federal authority and carried over into the guaranty period by force of the Transportation Act, 1920, independently of the Interstate Commerce Commission? We think it did. Obviously and logically a consideration of the right to determine what the just and reasonable rate is precedes the determination of such rate, and the original report of the Public Service Commission evidences consideration and decision of the former question. They say (page 8 of plaintiff's statement) referring to the Transportation Act, 1920, Section 208(a):

"Even if the said act is intended to apply to intrastate rates and to continue in effect for such traffic rates established by the Director General, upon relinquishment from Federal control the State law becomes immediately operative."

And again (page 9 of plaintiff's statement):

"The Transportation Act of 1920, Section 208 (a) establishes the intrastate rates as well as the interstate rates to be effective upon the [fol. 88] termination of Federal control, but the sovereign power of the State to regulate intrastate rates is clearly recognized in that it provides that such rates 'shall continue in force and effect until thereafter changed by State * * * authority. Congress enacted

the laws which made possible the assumption of control and the operation of the railroads of the country and logically must provide the legislation for the return of those properties to their owners.

"Federal control endured for over two years. So long a period even under normal conditions could not be without changes in rates. As few, if any, rates remained unchanged, it was imperative that the legislation returning the carriers to their pre-war operating status should establish a rate status. We are also of the opinion that the rates thus established became subject to The Public Service Company Law immediately when the railroads were restored to their owners."

That this question was actually raised, considered and decided in the original proceedings is conclusively shown by the following excepts from the Commission's Report in the supplemental proceedings to determine the amount of reparation to which the plaintiff was entitled:

"As to the period covered by Federal Guaranty its (the respondents) position is equally definite: * * *

'It is the defendants' position, first, that since the rates attacked were in effect on February 29, 1920, they continued to be lawful rates for this transportation and that the decision of this Commission in Case No. 3206, insofar as it purported to effect a reduction in the [fol. 89] rates of the defendants for transportation between March 1st, 1920 and September 1st, 1920, was void because not approved by the Interstate Commerce Commission and could, therefore, give the complainant no right to reparation; and, second, that an order in this case requiring the defendants to pay reparation on such shipments would, in effect be an order reducing the rates charged and, without the approval of the Interstate Commerce Commission, would be of no effect under the section of the Transportation Act above quoted.'

"The first of these objections that the rates in effect on March 1st, 1920, and during the six months following were lawful rates was advanced by respondent in the original proceeding (P. U. R., 1921, E p. 80 supra) wherein we determined the reasonable rates. There is no question but that the rates were the lawful rates in the sense that they were 'a collectible rate, or one that may be sued for. Suburban Water Co. vs. Boro. of Oakmont, 268 Pa., 243. The position that the rates in effect on March 1st, 1920, were not revisable by this Commission on complaint is without support in law. In our former opinion we stated: (see pages 10 and 11 of this opinion) * * * and we see no reason for any change, particularly as the parties have not by appellate proceedings sought modification or reversal of our conclusions."

We conclude that the question now raised by these affidavits of defense having been necessarily involved and actually considered and decided in the original proceedings before the Public Service Commission, the defendants are precluded from again raising it in this collateral proceeding. If they desired to question the validity of the findings of the Public Service Commission in this respect,

[fol. 90] without the approval of the Interstate Commerce Commission, their exclusive method of doing so was by appeal to the Superior Court.

The decision of the Public Service Commission on the question of what is a reasonable rate, and of all matters leading up thereto, or necessarily involved therein, is conclusive if not appealed from; and, if an appeal is taken, the decision of the Superior Court thereon is conclusive. New York & Penn'a Co. vs. N. Y. Cent. R. R. Co., 267 Pa., 64.

It would be improper to grant an order of reparation on the hearing of objections to a proposed new schedule of rates. This question does not arise until after the reasonableness of the rate has been finally determined, either by a decision of the Public Service Commission unappealed from, or by the Superior Court on appeal. *Ibid.*

It would, for the same reason, be equally improper to grant an order of reparation on the hearing of a complaint against existing rates, which was the subject matter of the original proceedings before the Public Service Commission in this case.

On a petition for an order of reparation all questions decided, or which might have been raised and decided, on the hearing of objections to the schedule of rates, must be considered as having been finally concluded thereby. N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. If such questions were finally concluded on the hearing of objections to the schedule of rates and could not be raised on a petition for an order of reparation, of course they could not be raised in a suit brought on an order of reparation.

The conclusion at which we have arrived makes it unnecessary for us to consider the merits of the defendants' position based upon the [fol. 91] Transportation Act, 1920, or the other reasons assigned by the plaintiff in support of its motion for judgment for want of a sufficient affidavit of defense, and as no defense other than that already considered has been raised by the pleadings, or suggested, upon the argument, judgment should be entered in favor of the plaintiff and against the defendants for the amount claimed with interest.

Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter Judgment accordingly, amount to be liquidated by him.

By the Court,

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order and at their request a bill is sealed.

By the Court,

E. H. Baird, P. J. (Seal.)

[File endorsement omitted.]

[fol. 92–95] Bond on Appeal for $14,000—Approved and filed Aug. 8, 1923; omitted in printing

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[fol. 96] In Supreme Court of Pennsylvania, Eastern District, City and County of Philadelphia

Writ of Certiorari and Return—Filed in Common Pleas Court Aug. 11, 1923; in Supreme Court March 14, 1924

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Clinton, Greeting:

We, being willing for certain causes, to be certified of the matter of the Appeal of New York Central Railroad Company and Pennsylvania Railroad Company from the judgment of your said Court at No. 5 of January Term, A. D. 1923, wherein New York & Pennsylvania Company was Plaintiff and the said appellants were Defendants, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the third Monday of March next (1924), so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the Laws of the said State ought.

Witness, the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the ninth day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Rudolph M. Schick, Prothonotary pro Tem. (Seal.)

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

By the Court.

E. H. Baird, P. J. (Seal.)

[File endorsement omitted.]

[fol. 97] IN SUPREME COURT OF PENNSYLVANIA IN AND FOR THE EASTERN DISTRICT

NEW YORK & PENNSYLVANIA COMPANY

v.

NEW YORK CENTRAL RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, Appellants

Appeal from the Court of Common Pleas for the County of Clinton, No. 5, January Term, 1923

ORDER ENLARGING TIME—Filed May 14, 1924

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in above case pending the filing of a petition for reargument.

R. v. M., C. J.

True copy from record.

In testimony whereof I have hereunto set my hand and the seal of said Court, at Philadelphia, this 12th day of May, 1924.

Thomas Robins, Prothonotary. (Seal.)

[File endorsement omitted.]

[fol. 98] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ORDER TO HOLD RECORD—Filed Aug. 1, 1924

July 28, 1924.—Motion to hold record filed.

Order

And now, July 26, 1924, it is ordered that the record in the above case be returned to this court and held until August 26th, 1924.

Simpson, J.

True copy from record.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Philadelphia, this twenty-eighth day of July, 1924.

Thomas Robins, Prothonotary. (Seal.)

[File endorsement omitted.]

[fol. 99] In Supreme Court of Pennsylvania, January Term, 1924

Docket Entries

169

New York & Pennsylvania Company, Plaintiff,

v.

New York Central Railroad Company and Pennsylvania Railroad Company, Defendants

Appeal of Defendants from the Judgment

T. R. White, 8/15/23.
Parker McCollester, Henry Wolfe Bikle, Seth T. McCormick, Jr., Henry Hipple.
No. 5, January Term, 1923.
Appeal from Court Common Pleas of the County of Clinton filed August 9, 1923.
Eo die.—Certiorari exit, retble. third Monday March, 1924.
March 12, 1924.—Assignments of Error filed.
March 14, 1924.—Record returned & filed.
March 17, 1924.—Argued.
April 21, 1924.—The judgment is affirmed. Opinion by Sadler, J.

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in the above case pending the filing of a petition for reargument.

R. von M., C. J.

May 1, 1924.—Remittitur exit and with record sent to Prothonotary of Clinton Co.
May 12, 1924.—Acknowledgment of remittitur and record received and filed.
May 12, 1924.—Certificate exit and sent to Prothonotary of Clinton Co.
May 13, 1924.—Petition for reargument filed.
May 14, 1924.—Answer to Petition filed.
May 14, 1924.—Record returned and filed.
May 19, 1924.—Opinion filed in this case is temporarily withdrawn. By the Court.
July 8, 1924.—The judgment is affirmed. Opinion by Sadler, J.
July 19, 1924.—Remittitur exit and with record sent to Prothonotary of Clinton Co.
July 25, 1924.—Acknowledgment of Remittitur and record received and filed.
July 25, 1924. Motion to hold record filed.

And now, July 26, 1924, it is ordered that the record in the above case be returned to this court and held until August 26th, 1924.

Simpson, J.

July 28, 1924.—Certificate of Order exit and sent to Prothonotary of Clinton County.

August 1, 1924.—Record returned & filed.

[fol. 100] August 25, 1924, Petition for reargument filed.

Sept. 29, 1924.—Petition refused. Clerical error on page 2 corrected. Per Curiam.

October 6, 1924.—Record returned to: Prothonotary of Clinton Co.

Oct. 17, 1924.—Acknowledgment of record received and filed.

And now, October 18, 1924, it is ordered that the Record in the above entitled case be returned to the Prothonotary of the Supreme Court at Philadelphia, pending application for Writ of Error to the Supreme Court of the United States.

R. v. M., Chief Justice.

Oct. 18, 1924.—Certificate exit and sent to Prothonotary of Clinton Co.

Oct. 21, 1924.—Acknowledgment of Certificate received and filed.

Oct. 21, 1924.—Record returned & filed.

December 18, 1924.—Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Pennsylvania, filed.

December 18, 1924.—Assignments of Error to Supreme Court of the United States filed.

On reading of the petition of The New York Central Railroad Company and The Pennsylvania Railroad Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Pennsylvania, Eastern District, as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One Thousand Dollars, that the said plaintiffs in error shall prosecute said writ of error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decree on account of said writ of error.

In witness thereof, I have hereunto set my hand this 18 day of December, 1924.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, Eastern District.

December 19, 1924.—Writ of Error from the Supreme Court of the United States filed. Allowed by Hon. Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

December 19, 1924.—Citation, with acceptance of service and order for appearance for Defendant in Error endorsed thereon. [fol. 101] brought into office.

December 19, 1924.—Bond for One Thousand ($1,000) Dollars brought into office. Approved by Hon. Robert von Moschzisker, Chief Justice of Supreme Court of Pennsylvania.

December 19, 1924.—Praecipe for certification of record to the Supreme Court of the United States filed.

[fol. 102] In Supreme Court of Pennsylvania

[Title omitted]

Appeal and Affidavit—Filed Aug. 9, 1923

Enter appeal on behalf of above defendants from the judgment of the Court of Common Pleas of the County of Clinton.

Seth T. McCormick, Jr., Henry Hipple, Attorney for Appellant.

To Thomas Robins, Prothonotary Supreme Court, Eastern District, County of Clinton.

Henry Hipple, the duly authorized attorney for appellants, being duly sworn, saith that said appeal is not taken for the purpose of delay, but because appellant- believe they have suffered injustice by the judgment from which they appeal.

Henry Hipple.

Sworn and subscribed, this 6th day of August, A. D. 1923. Myrtle D. Achuff, Notary Public. My commission expires January 22, 1925. (Seal.)

The names and office addresses of Attorneys for Appellees are as follows: B. F. Geary, Lock Haven, Penna.; Thomas Raeburn White, 700 West End Trust Building, Philadelphia, Penna.

[File endorsement omitted.]

[fol. 103] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL—Filed Aug. 15, 1923

To appellee or his counsel:

You are hereby notified that on August 9th, 1923, an appeal was taken to the Supreme Court in the above-entitled case.

Seth T. McCormick, Jr., Henry Hipple, Attorneys for Appellant.

August 11th, 1923, service of the foregoing notice is hereby accepted; and the prothonotary of the Supreme Court is directed to enter the appearance of the undersigned for the appellee.

T. R. White.

NOTE.—Counsel for Appellant should serve the foregoing notice upon the opposite party or his counsel as required by Rule 58 (printed below) and return it with acceptance of service to the office of the Prothonotary, Room 458 City Hall, Philadelphia, Pa., for filing. If necessary under Rule 58, notice should also be served on the judge of the lower court and the stenographer.

Rule 58.—Immediately upon taking his appeal, appellant shall serve notice thereof on the opposite party or his counsel; and, if the appeal relates to any order, judgment or decree, for which the reasons do not already appear of record, on the judge who entered it; and also, if the official transcript of the evidence needed on the appeal has not been filed, on the stenographer who took it. Upon receipt of such notice, the court below shall forthwith file of record at least a brief statement of the reasons for such order, judgment or decree, in the form of an opinion, which shall be attached to the record and printed; and the official stenographer shall forthwith proceed to have his notes transcribed, approved and filed.

[File endorsement omitted.]

[fol. 104] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 12, 1924

1. The Court erred in making absolute the Rule to show cause why judgment should not be entered against defendants for want of a sufficient Affidavit of Defense; the motion for said Rule, the Reasons in Support thereof, and the Conclusion of the Court thereon, being as follows:

Motion for Judgment (Record, Page 66a)

"And now, to-wit: December 14th, 1922, on motion of Thomas Raeburn White and B. F. Geary, Attorneys for Plaintiff, a rule is granted on the defendants above named to show cause why judgment should not be entered in favor of the plaintiff and against the defendants for want of a sufficient Affidavit of Defense.

Returnable the fourth Monday of January, 1923.

By the Court.

E. H. Baird, P. J."

"And now, 12/16/22, service of within motion accepted and issuance of Rule waived.

McCormick & Hipple and M. E. Haggerty, Attorneys for Defendants."

[fol. 105] Reasons in Support of Motion (Record, Pages 67a, 68a, 69a)

The plaintiff, the New York & Pennsylvania Company, having moved for judgment in the above stated proceeding against the Pennsylvania Railroad Company, for want of a sufficient affidavit of defense, files the following reasons in support of said motion:

1. As to paragraph- 1-13 of the affidavits of defense, all material questions of fact and law sought to be raised therein have been decided by the commission against the defendants, in the proceedings at Complaint Docket No. 3206, and as no appeal has been taken from the decision in that case, the findings under Art. VI, Sec. 31, of the Public Service Company Law are conclusive upon the defendants, and cannot be attacked in this collateral proceeding.

2. As to paragraph 14-16 of the affidavits of defense, it appears from Exhibit A-D attached to the statement that the Public Service Commission found the rate in effect during the guaranty period unreasonable, and that plaintiff was entitled to reparation. As this is clearly a finding that the plaintiff's case for reparation was complete with the exception of proof as to the amount of reparation to be awarded, without action by the Interstate Commerce Commission, and as no appeal was taken, this finding is conclusive upon the defendants, and the right of the plaintiff to reparation is no longer open to question on the ground that an application should have been made to the Interstate Commerce Commission, and its consent obtained, before plaintiff could be entitled to reparation.

3. The award of reparation is valid, though not consented to by the Interstate Commerce Commission as averred in paragraph 14-16 of the affidavits of defense, because under Sec. 208 (a) of the Transportation Act:

(a) An award of reparation is not a reduction of a rate requiring the consent of the Interstate Commerce Commission.

(b) Even if a reparation award is construed to be a reduction of a rate, yet as this award was not made until after September 1, 1920, it did not require the consent of the Interstate Commerce Commission, and said Commission had no jurisdiction to approve or disapprove it.

4. Section 208 (a) of the Transportation Act applies only to "lines * * * subject to the Interstate Commerce Act," and therefore does not apply to the lines of railroad involved in this proceeding.

5. Upon the termination of Federal control, March 1, 1920, the laws of the States relating to intrastate commerce, including the Pennsylvania Public Service Company Law, which had been suspended during the Federal control, again became operative, and the Interstate Commerce Commission had no further jurisdiction over intrastate rates, except where discrimination against interstate commerce was alleged. As there is no question of such discrimination in this case, there is no ground for the allegation that recovery of the [fol. 106] reparation involved in this proceeding, would be in violation of the Transportation Act, 1920.

T. R. White, B. F. Geary, Attorneys for Plaintiff."

Conclusion of the Court. (Record, Pages 80a to 82a)

"We conclude that the question now raised by these affidavits of defense having been necessarily involved and actually considered and decided in the original proceedings before the Public Service Commission, the defendants are precluded from again raising it in this collateral proceeding. If they desired to question the validity of the findings of the Public Service Commission in this respect, without the approval of the Interstate Commerce Commission, their exclusive method of doing so was by appeal to the Superior Court.

The decision of the Public Service Commission on the question of what is a reasonable rate, and of all matters leading up thereto, or necessarily involved therein, is conclusive if not appealed from; and, if an appeal is taken, the decision of the Superior Court thereon is conclusive. New York & Penn'a Co. vs. N. Y. Cent. R. R. Co., 267 Pa. 64.

It would be improper to grant an order of reparation on the hearing of objections to a proposed new schedule of rates. This question does not arise until after the reasonableness of the rate has been finally determined, either by a decision of the Public Service Commission unappealed from, or by the Superior Court on appeal. Ibid.

It would, for the same reason, be equally improper to grant an order of reparation on the hearing of a complaint against existing rates, which was the subject matter of the original proceedings before the Public Service Commission in this case.

On a petition for an order of reparation all questions decided, or which might have been raised and decided on the hearing of objections to the schedule of rates, must be considered as having been

finally concluded thereby. N. Y. & Pa. Co. vs. N. Y. C. R. R. Co. Supra. If such questions were finally concluded on the hearing of objections to the schedule of rates and could not be raised on a petion for an order of reparation, of course, they could not be raised in a suit brought on an order of reparation.

The conclusion at which we have arrived makes it unnecessary for us to consider the merits of the defendants' position based upon the Transportation Act, 1920, or the other reasons assigned by the plaintiff in support of its motion for judgment for want of a sufficient affidavit of defense, and as no defense other than that already considered has been raised by the pleadings, or suggested, upon the argument, judgment should be entered in favor of the plaintiff and against the defendants for the amount claimed with interest. [fol. 107] Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter judgment accordingly, amount to be liquidated by him.

By the Court.

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order and at their request a bill is sealed.

By the Court. E. H. Baird, P. J. (Seal.)"

2. The Court erred in its Final Order and Decree, and in directing Judgment to be entered against the Defendants, which said Order and Decree, the Judgment thereon and the Exception taken thereto, are as follows: (Record, page 83a).

Final Decree and Judgment

Now, July 23, 1923, the rule to show cause heretofore granted, is made absolute, and the Prothonotary is directed to enter judgment accordingly, amount to be liquidated by him.

By the Court.

E. H. Baird, P. J.

Now, July 23, 1923, the defendants except to the above order, and at their request a bill is sealed.

By the Court. E. H. Baird, P. J. (Seal.)

And now, July 23, 1923, by the direction of the Court, judgment is entered in favor of the Plaintiff and against the Defendants for the sum of Six Thousand Five Hundred Forty-six 34/100 Dollars, as follows:

Principal	$6,172.97
Interest from July 20, 1922, to July 23, 1923	373.46
Real debt	$6,546.43

Entered July 23, 1923. Judgment, $6,546.43.

L. D. Geo. G. Hickoff, Prothy."

Parker McCollester, Henry Wolf Bikle, Seth T. McCormick, Jr. Henry Hipple, Attorneys for Appellants.

[fol. 108] [File endorsment omitted.]

[fol. 109-111] In Supreme Court of Pennsylvania

[Title omitted]

Order Enlarging Time—Filed April 25, 1924

And now, April 25, 1924, it is ordered that fifteen days additional be allowed, in which to hold the record in the above case, pending the filing of a petition for reargument.

R. von M., C. J.

[File endorsement omitted.]

[fol. 112] In Supreme Court of Pennsylvania

[Title omitted]

Petition for Reargument—Filed May 13, 1924

Now come the appellants and petition the court to grant them a reargument in this case and in support of their petition respectfully show as follows:

I

This case came to this court on appeal from a judgment of the [fol. 113] Court of Common Pleas of Clinton County, Pennsylvania, in an action under Article V, Section 5, of the Public Service Company Law to recover the amount of reparation awarded by the Public Service Commission to the appellee, the plaintiff below, because of the collection by the appellants of freight rates for the transportation of coal from mines in the Munson and Hawk Run Districts consigned to the appellee at Lock Haven, Pa., during the so-called "Guaranty Period," namely, from March 1, 1920, to September 1, 1920, which were alleged to be unreasonable in violation of the provisions of the Public Service Company Law.

II

Argument was had before this court on March 17, 1924, and on April 21, 1924, this court in an opinion written by Mr. Justice Sadler announced its decision affirming the judgment of the court below. The opinion is included herein as Appendix B, page 18.

III

The rates for the transportation of coal from mines in the Munson and Hawk Run Districts to Lock Haven, Pa., have in the past seven or eight years been the subject of numerous changes, changes made voluntarily by the carriers and changes made pursuant to orders of the Public Service Commission, and these rates have also been the subject of consideration in various proceedings before the Public [fol. 114] Service Commission, the Interstate Commerce Commission and the courts of this State. Their history is therefore exceedingly involved and it is difficult even for one who has been closely associated with the various transactions accurately to describe them.

For this reason it is perhaps not surprising that the parties at the argument failed to convey to the court a clear and accurate impression of the facts. Probably because of this, the opinion of the court contains a number of statements with respect to the rates and their history which are in error and it is in order to bring these errors to the court's attention that the appellants petition the court to grant them a reargument.

There are no issues of fact in the case, there being no dispute between the parties as to the material facts involved, and the errors which form the basis for this petition are merely errors which reflect, we believe, a failure to understand these facts as they appear in the record.

IV

The appellants believe that the errors contained in the court's opinion are material, for the court's conclusions seems to be predicated on the facts as stated by it and the opinion of the court leads to the belief that a different conclusion would have been reached had the parties given to the court a correct impression of the facts.

[fol. 115]

V

The appellants believe that the court's opinion reflects an erroneous impression of the facts in the following respects:

(a) In the concluding paragraph of the opinion the court states:

"Had the State Commission previously approved a tariff such as now insisted upon, *or had the Director General of Railroads so ordered and filed it, then the sums fixed would determine the amount chargeable during the period in question* (*Atlantic Coast Line Ry.* v. *R. R. Comm.*, 281 Fed. 321), *but this was not done*, and the rate then becoming due—determined to be proper by the body provided by the State, which passed on this matter, and whose decision is unappealed from—must control." (Italics ours.) (Infra p. 23.)

From the words italicized we take it to be the opinion of the court that if the $1.10 rate had been ordered and filed by the Director General prior to the termination of Federal control it would have

determined the amount of the rates chargeable during the Guaranty Period, and that the court reaches a conclusion contrary to appellants' contention because it finds that the $1.10 rate was not filed by the Director General.

That the court erred in assuming that the rate of $1.10 was not ordered or filed by the Director General is indicated by the following portions of the record:

Paragraph 2 of the plaintiff's statement of claim was as follows:

[fol. 116] "2. On and *prior to February 29, 1920*, the freight rates charged and collected by defendant on coal so shipped, *according to their tariffs duly filed*, consisted of a rate of 70¢ per ton of 2,240 pounds, charged by the defendant, The New York Central Railroad Company, from the mines to Bald Eagle Junction, and a rate of 40¢ per ton charged by the defendant, The Pennsylvania Railroad Company, for the movement from Bald Eagle Junction to Lock Haven, making *a through rate of $1.10 per ton* for the total movement" (Record, p. 6a). (Italics ours.)

In Case No. 3206 the State Commission found as follows:

"The tariff of the Pennsylvania Railroad publishes 40 cents per 2,240 pounds from the Junction (known on the Pennsylvania as Mill Hall Junction) to Lock Haven, thereby constituting a through rate of $1.10 per 2,240 pounds.

These rates were initiated by the Director General and being those in effect on February 29, 1920, became, with the termination of Federal control, the established rates on March 1, 1920, by virtue of the 'Transportation Act, 1920,' entitled 'An Act to provide for the termination of Federal control of railroads and systems of transportation, etc.,' particularly Section 208 (a)" (Record, p. 10a).

* * * * * * *

"The record and the Commission's tariff file clearly establish the fact that the only changes made in the rates here in issue during Federal control from those in effect just prior to Federal control were *in pursuance of General Order No. 28 of the Director General.* The legality and necessity of that order were at least tacitly acknowledged by the Commission in that by Special Permission No. 2367 of August 10, 1920, the increases allowed by Ex Parte 74, 58 [fol. 117] I. C. C. 220-260, which were superimposed upon those made under General Order No. 28 were permitted" (Record, p. 16a). (Italics ours.)

Each of the appellants in paragraph 2 of its affidavit of defense admitted as follows:

"It admits that the freight rates charged and collected for the transportation of coal between the points named in paragraph 2 of the Plaintiff's Statement of Claim were on, and for a considerable period prior to February 29, 1920, as alleged in said paragraph 2; but avers

that *prior to February 29, 1920,* the lines of the defendants were under Federal control and *said rates were charged and collected by the President of the United States through the Director General*" (Record, pp. 34a, 50a). (Italics ours.)

The Interstate Commerce Commission described as follows the establishment of the $1.10 rate:

"On June 25, 1918, an increase of 22.4 cents was added to the 80-cent through rate, under General Order No. 28, and the fraction dropped, making the through rate $1, the rate to Bald Eagle Junction being 60 cents and the rate beyond 40 cents. On July 1, 1919, the alleged error in making the increase of June 25, 1918, was corrected by adding to the through rate of 75 cents, in effect on June 1, 1917, 15 cents, and then adding 22.4 cents, as permitted by General Order No. 28, and dropping the fraction, making the through rate $1.10" (Record, p. 46a).

It is obvious that since the Director General was operating the railroads prior to February 29, 1920 (from December, 1917 to February 29, 1920), anything which was done in initiating rates or filing tariffs during that period was, as a matter of law, done by the Director General.

[fol. 118] The court may have been misled by the fact that the appellee, in the case before the Interstate Commerce Commission, contended that the rate of $1.10 resulted from a failure of the Director General's subordinates correctly to carry out his General Order No. 28 (Record pp. 46a-47a). It is needless to discuss this point further since the Interstate Commerce Commission held that the $1.10 rate was a lawful rate to be charged by the Director General during the period of Federal control (Record, pp. 57a-65a), and under Section 10 of the Federal Control Act (40 Stat. L. 451), the only way in which the Director General could change or initiate rates was by filing them with the Interstate Commerce Commission.

If, therefore, it is the opinion of the court as a matter of law that "had the Director General of Railroads so ordered and filed it (the $1.10 rate), then the sums fixed would determine the amount chargeable during the period in question (Atlantic Coast Line Ry. Co. v. R. R. Comm., 281 Fed. 321)", it follows that from a correct understanding of the facts the court should have concluded that the rate of $1.10 which was charged was the lawful rate and that the judgment of the court below should have been reversed.

The error here discussed, therefore, is obviously a material one.

(b) The opinion of the court indicates that the court has proceeded upon the assumption that the rate of $1.00, the benefit of which is claimed by the appellee, was fixed by the State Commission prior to Federal control. This is indicated by the following language of the court's opinion:

[fol. 119] "At the time it (the Transportation Act) became effective, *there was outstanding the direction of the State Board that the joint charge be one dollar,* though the amount fixed by the govern-

ment was $1.10. On August 26, 1920, by a general order of the Interstate Commerce Commission, a flat rate, increasing by forty per cent the sums collectible, was made: Ex-Parte 74, 58 I. C. C. 220, 260. This resulted in a permissible allowance of $1.40, *if the charge previously fixed by the State Board* was to control, and based on that allowed during the war period, $1.54.' (Italics ours.) (*Infra* pp. 19, 20.)

* * * * * * *

"It will be noted that the original conclusion reached by the Public Service Commission, whereby a reasonable rate was fixed, was not appealed from, and thereby the decision of that tribunal definitely determined the rights of the parties as of *the date prior to federal control, at one dollar,* and was binding on them." (Italics ours.) (*Infra* p. 21.)

However, the determination by the State Commission that the rate should be $1.00, instead of having been made prior to Federal control, was not made until the Commission's decision in Case No. 3206 which was not announced until August 17, 1921, more than one year after Federal control had terminated (Record, pp. 9a-18a), (Plaintiff's Statement of Claim, Record, pp. 6a-7a). Even when this opinion was announced, moreover, the Commission, as will be seen from the opinion itself, made no order establishing a rate of $1.00—its only orders made in connection with the announcement of this decision being orders for the establishment thereafter of a rate of $1.40 (Record, pp. 18a-23a). The Commission made no [fol. 120] order purporting to make applicable to shipments moving during the Guaranty Period or at any other time a rate of $1.00 until the Commission's reparation order in Complaint Docket No. 4738 which is the basis of the present suit and which was not made until more than two years after the termination of Federal control (Record, pp. 29a-30a).

That this error of the court was material is indicated by the fact that it has led the court to an erroneous impression of the issues to be determined, and of the effect of the reparation order of the Public Service Commission which is the basis of the present suit. This is shown by the following language of the court's opinion:

"The rates now under consideration are solely intrastate, and it is for us to determine whether the tariff, fixed and approved by the State authorities, in force prior to the Federal Control Act, shall measure the responsibilities of the parties, or be based on that permitted by the Interstate Commerce Commission, in effect on February 29, 1920. The legislation which controls, provides that there shall be no reduction in rates during the guarantee period, unless approved by the governmental agency, but the action taken here did not effect a lowering in rates during the time fixed, but merely enforced a corrected charge which had been made prior to federal control." (Infra p. 21.)

The State Commission's reparation order did not "merely enforce a corrected charge which had been made prior to Federal

control," since this $1.00 rate was never in effect and was never prescribed prior to Federal control. Therefore, as we contend, the reparation order did attempt to effect a reduction of the rate established by the Director General.

[fol. 121] And, likewise, since the rate of $1.00 which the reparation order seeks to enforce was never ordered prior to Federal control the issue here to be determined cannot be, as the court appears to believe, whether a tariff ordered by the State Commission prior to Federal control became again immediately operative upon the termination of Federal control. The issue to be decided is whether a reparation order of the State Commission made more than two years after the termination of Federal control purporting to give effect to rates lower than the rates which were in effect on February 29, 1920, and which had been held reasonable by the Interstate Commerce Commission, can be enforced without the approval of that body and in spite of the provisions of Section 208(a) of the Transportation Act.

The issue could be as stated in the court's opinion only if the State Commission's reparation order upon which this suit is based gave the appellee the benefit of a rate of 80 cents instead of $1.00, for, as will be seen from the opinion of the Interstate Commerce Commission in New York & Pennsylvania Co. v. Director General, 58 I. C. C. 124, made a part of the appellants' affidavits of defense (Record, pp. 41a-49a), the rate ordered by the State Commission prior to Federal control was a rate of 80 cents made up of the New York Central's rate of 55 cents and the Pennsylvania's rate of 25 cents (Record, pp. 45a-46a).

The court is doubtless misled by the fact that the appellee in its complaint to the State Commission in Complaint Docket No. 3206 claimed that this order of the Commission requiring the 80 cent [fol. 122] rate became operative again after the termination of Federal control, March 1, 1920. However, the State Commission itself ruled that its order prescribing the 80 cent rate did not become operative immediately upon the termination of Federal control (Record, p. 13a). There is, therefore, no issue in the present suit turning upon a rate ordered prior to Federal control, and to the extent that the court has assumed that such was the situation the court's opinion is in error.

For the court's convenience we have included in this petition an appendix (infra p. 15), which sets forth in chronological order the various changes in the rates and the orders of the Commissions.

(c) The court's opinion suggests that the court is of the impression that the opinion of the Commission finding reasonable the rate of $1.00 was approved as final by this court in New York & Pennsylvania Co. v. New York Central, 267 Pa. 64. Such, however, is not the fact. In that proceeding this court was called upon to consider an earlier decision of the Commission rendered in 1917 dealing only with a rate of the New York Central from the mines to Bald Eagle Junction—the New York Central's rate prescribed by the Commission in that proceeding being 45 cents.

(d) In the last paragraph of its opinion the court says:

"From its (the Commission's) *order* no appeal was taken, though permitted by law." (Italics ours.) (Infra p. 23.)

The court erred in assuming as is indicated by the sentence quoted [fol. 123] that in the proceeding before the Commission from which the appellants failed to appeal (Complaint Docket No. 3206) the Commission made an order with respect to the rates charged on the shipments here in question. As has already been pointed out, the Commission expressed the opinion that the rates during the Guaranty Period were unreasonable to the extent that they exceeded $1.00 prior to August 26, 1920, but made no order whatsoever.

It is not clear, of course, whether the court would have concluded that an appeal from the Commission's decision in Case No. 3206 "was permitted by law" had it understood that in connection with that decision the Commission made no order concerning the rates for the period here involved. However, the fact that the Commission made no such order with reference to the rates for this period is one of the reasons urged by the appellants in support of their contention that no appeal could have been taken from the Commission's decision with respect to the issues raised by their affidavits of defense. If the appellants' contentions in this respect are sound the court's impression that the Commission in Case No. 3206 made an order with reference to the rates during the Guaranty Period was a material error.

The appellants' arguments on this point are set forth at length at pages 13 to 46 of our original brief. In connection with the apparently erroneous statement in the Court's opinion, however, we feel that we should point out the difficulty of reconciling the view that an appeal was "permitted by law" from the Commission's decision on [fol. 124] Case No. 3206, with respect to the reparation issue, with the opinion of this court in the case of Lehigh & New England R. R. Co. v. Public Service Commission, 277 Pa. 493, where this court indicated the view, at least as we read the opinion, that an appeal from a decision of the Public Service Commission that a rate was unreasonable, but unaccompanied by an order for reparation, could not bring before the court the question of the power of the Commission subsequently to order reparation on shipments moving during the Guaranty Period.

(e) In view of the sentence quoted from the court's opinion in section (a) of this petition, we feel that we should point out that the following conclusion of law from the same paragraph of the opinion is apparently inconsistent therewith:

"The Transportation Act authorizes the states to change the then existing federal rates, in so far as intrastate carriage is concerned during the guarantee period, without the approval of the Interstate Commerce Commission, for it expressly provided that this could be made by local authority." (Infra p. 23.)

We submit that the court erred in this last quoted clause in that the court failed to give any significance whatsoever to the language of the Transportation Act prohibiting a reduction during the Guaranty Period without the approval of the Interstate Commerce Commission.

We submit further that even if the State Commission prior to the termination of Federal control had ordered a rate of $1.00, or re-[fol. 125] gardless of the rate ordered by the State Commission, the only lawful rate during the Guaranty Period was the rate of $1.10, since this rate was established by the Director General and was in effect on February 29, 1920, since Section 208 (a) of the Transportation Act, 1920, continued this rate in effect thereafter and prohibited any reduction without the approval of the Interstate Commerce Commission prior to September 1, 1920.

VI

Believing that the court in its opinion has proceeded upon an erroneous view of the facts in the particulars hereinbefore indicated, and believing also that these errors had a material effect upon the court's decision, the appellants feel that they should seek an opportunity on reargument to set before the court a correct statement of the facts and the arguments upon such facts.

Wherefore, the appellants pray that the court may grant them the privilege of reargument; that, pending its decision of such reargument, the court may retain the record in this case and may not remit the same to the court below, and that it may make such other or further order as in the premises may be proper.

Respectfully submitted, Henry Wolfe Bikle, Henry Hipple, Seth T. McCormick, Jr., Parker McCollester, Attorneys for Appellants.

May 9, 1924.

[fol. 126] Appendix A—Chronological Table

July 24, 1917.—Pubic Service Commission ordered the New York Central to reduce its rate from 55 cents to 45 cents. (Decision held conclusive because not appealed from in N. Y. & Pa. Co. v. N. Y. C., 267 Pa. 64.)

December 10, 1917.—Public Service Commission ordered New York Central's rate made 55 cents, Pennsylvania's 25 cents—through rate 80 cents.

January 1, 1918.—Federal control—Railroads operated by Director General.

June 25, 1918.—Director General made rates of New York Central 60 cents, of Pennsylvania 40 cents—through rate $1.00.

July 11, 1919.—Director General increased rate of New York Central to 70 cents, Pennsylvania's rate remaining 40 cents—through rate $1.10. This rate remained in effect throughout the balance of Federal control and was in effect on February 29, 1920.

February 29, 1920.—Federal control terminated. Beginning of six months' Guaranty Period under Transportation Act.

June 18, 1920.—Interstate Commerce Commission held rate of $1.10 was reasonable and lawful rate during Federal control and denied appellee's claim for reparation to basis of $1.00 rate on shipments moving prior to and including February 29, 1920.

[fol. 127] August 26, 1920.—Through rate increased to $1.54 pursuant to Interstate Commerce Commission's decision in Ex Parte 74.

September 1, 1920.—End of Guaranty Period.

August 17, 1921*—State Commission announced its decision in Complaint Docket No. 3206 that rates of $1.10 and $1.54 were unreasonable after Federal control and that reasonable rate on shipments from March 1, 1920, to August 26, 1920, would have been $1.00, and on shipments after August 26, 1920, $1.40. Ordered railroads to file tariffs naming rate of $1.40 for future, but made no order with respect to Guaranty Period. Supplemental orders with respect to rates for future made on August 29 and October 18, 1921.

October 28, 1921.—Rate for future reduced to $1.40 pursuant to such orders.

February 6, 1922.—Appellee filed complaint with Public Service Commission (Complaint Docket 4738), asking reparation to basis of rate of $1.00 on shipments from March 1, 1920 to August 26, 1920, and $1.40 from August 26, 1920 to October 28, 1921.

June 20, 1922.—Public Service Commission ordered appellants to [fol. 128] pay reparation to basis of rates of $1.00 on shipments from March 1, 1920 to August 26, 1920 and $1.40 on shipments after August 26.

October 19, 1922.—Appellants having declined to pay reparation on shipments during Guaranty Period because the Interstate Commerce Commission had not approved the reduction of the Guaranty Period rates, appellee brought this suit to recover the amount awarded by the Commission.

*It was the failure of appellants to appeal from this decision of the Commission which the Court below held made this decision conclusive on complainant's right to reparation on shipments moving during the Guaranty Period, although the Commission at the time of this decision made no order with respect to the Guaranty Period but expressly announced that a further petition should be presented for an award of reparation on past shipments.

[fol. 129]

Appendix B

(128)

EASTERN DISTRICT

No. 169, January Term, 1924

NEW YORK & PENNSYLVANIA COMPANY

vs

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation of the State of New York, and the Pennsylvania Railroad Company, a Corporation of Pennsylvania, Appellants.

Appeal from the Judgment of the Court of Common Pleas of Clinton County, Pennsylvania, to No. 5, January Term, 1923

Filed, April 21, 1924

SADLER, J.:

The New York Central Railroad transported coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which it was moved by the Pennsylvania Railroad Company to Lock Haven, all being points within the State. In 1917, the Public Service Commision made an order requiring the two companies to fix a proportional rate of sixty-five cents per gross ton for the service performed. This was later in the same year increased to eighty cents.

Thereafter, the President of the United States took over the operation of all railroads, pursuant to the powers granted by the Federal [fol. 130] Control Act, and exercised power as to both interstate and intrastate corporations until March 1, 1920: Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135. The previous tariffs filed by the defendant companies were then in force, and, by virtue of a reparation order made by the Public Service Commission, a recovery was had against the New York Central Railroad Company, for the excess charges which had been made preceding that period. Later, the joint rate allowed on shipments of the character referred to was increased to one dollar. By virtue of Federal permission, as declared by the Interstate Commerce Commission, it was fixed at $1.10, notwithstanding the order of the State authorities.

Government control ceased on February 29, 1920, but the Transportation Act, then made effective, attempted to protect for six months the railroads returned to their owners. It provided as follows: "All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but, prior to

September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce such rate, fare, or charge unless such reduction or change is approved by the Commission." At the time [fol. 131] it became effective, there was outstanding the direction of the State Board that the joint charge be one dollar, though the amount fixed by the government was $1.10. On August 26, 1920, by a general order of the Interstate Commerce Commission, a flat rate, increasing by forty per cent the sums collectible, was made: Ex-parte 74, 58 I. C. C. 220, 260. This resulted in a permissible allowance of $1.40, if the charge previously fixed by the State Board was to control, and based on that allowed during the war period, $1.54.

A request for further reparation was made by the plaintiff company, it having paid on the basis of the Federal allowance in effect on March 1, 1920. The Public Service Commission of the State sustained the contention that the rate which it had fixed, and was unappealed from (N. Y. & Pa. Co. vs. N. Y. C. R. R. Co., 267 Pa. 64), should control, and not that fixed by order of the government, during the period of the war. The argument of the defendants rests on that phrase in the Transportation Act which says that charges shall not be reduced during the six-months' period, and, in calculating the amount payable, the government rate, in force prior to February 29, 1920, shall control.

This makes necessary a consideration of the Congressional legislation, already referred to, which provides that rates shall not be reduced, unless approved by the Interstate Commerce Commission during the time therein specified. Our Public Service authorities, in the reparation order—and it may be noted that the Interstate Commerce Commission had no power to direct any reparations—[fol. 132] separated the periods before and after September 1, 1920, and, in the first decree, directed repayment on the basis of sums collected in excess of the original allowance of one dollar per ton, and, in the second, the amounts received beyond $1.40. As to the latter, payment was made as directed, but, as to the former, it was refused, and the result was this litigation, which ended in a judgment in favor of the plaintiff for want of a sufficient affidavit of defense, and this appeal followed.

It will be noted that the original conclusion reached by the Public Service Commission, whereby a reasonable rate was fixed, was not appealed from, and thereby the decision of that tribunal definitely determined the rights of the parties, as of the date prior to Federal control, at one dollar, and was binding on them (N. Y. & Pa. Co. vs. N. Y. C. R. R. Co., 267 Pa. 64). The original order fixing the rate, followed by the direction for reparation, made on the basis suggested, was the subject of litigation, but the affirmance of the judgment then entered terminated this controversy.

The rates now under consideration are solely intrastate, and it is for us to determine whether the tariff, fixed and approved by the State authorities, in force prior to the Federal Control Act, shall

measure the responsibilities of the parties, or be based on that permitted by the Interstate Commerce Commission, in effect on February 29, 1920. The legislation which controls, provides that there shall be no reduction in rates during the guarantee period, unless approved by the governmental agency, but the action taken here did not affect a lowering in rates during the time fixed, but merely [fol. 133] enforced a corrected charge, which had been made prior to Federal control.

Section 208a, above referred to, provides that the rates shall continue, until changed by State or Federal authority. During the war, both classes of charges were subject to Federal regulation, but this act, "confers no power on the Commission to deal with the intrastate rates. What * * * is to be done by the Commission 'in the exercise of its powers (is) to prescribe just and reasonable rates; i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. * * * It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce" (R. R. Com. of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563, and note, 22 A. L. R. 1100; of State of N. Y. v. U. S. and Interstate Commerce Comm., 257 U. S. 591; Texas v. Eastern Texas R. R. Co., 258 U. S. 204). As was well stated by Justice Kephart: "After the Act of 1920, the control by the Interstate Commerce Commission was (1) [fol. 134] to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) to remove discriminations against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic, aimed at persons or localities, by any intrastate rate schedule" (L. & N. E. R. R. Co. vs. Pub. Ser. Co., 277 Pa. 493, 501).

The Transportation Act authorizes the States to change the then existing Federal rates, insofar as intrastate carriage is concerned during the guarantee period, without the approval of the Interstate Commerce Commission, for it expressly provided that this could be made by local authority. On the termination of Federal supervision, the State regulation of the rates became, by its own force, effective (N. Y. C. R. R. Co. v. Pub. Ser. Com., 268 Fed. 558.) Had the State Commission previously approved a tariff such as now in-

sisted upon, or had the Director General of Railroads so ordered and filed it, then the sums fixed would determine the amount chargeable during the period in question (Atlantic Coast Line Ry. Co. v. R. R. Comm., 281 Fed. 321), but this was not done, and the rate then becoming due—determined to be proper by the body provided by the State, which passed on this matter, and whose decision is unappealed from—must control. From its order no appeal was taken, though permitted by law, and it follows that plaintiff was entitled to recover for the overcharges on the tonnage admittedly billed and paid for at the higher rate. The assignments of error should, therefore, be overruled.

The judgment is affirmed.

[fol. 134½] May 19, 1924—Opinion filed in this case is temporarily withdrawn. (Signed) by the Court.

[fol. 135] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ANSWER TO PETITION FOR REARGUMENT—Filed May 14, 1924

The Court made no error of fact; the points raised by appellants in their petition for re-argument are based upon a misapprehension of what the Court said in its opinion.

(a) Petition for Reargument, Page 4.—Appellants assume that the Court was under the impression that the rate of $1.10 had not been ordered filed by the Director General of Railroads. We do not so understand the opinion and directly the opposite is stated by the Court (p. 19). Where the Court says: "Had the State Commission previously approved a tariff such as now insisted upon or had the Director General of Railroads so ordered and filed it," the tariff would have been legal and enforcible, etc., we understand the Court to have reference to the tariff which formed the basis of the $1.10 rate.

[fol. 136] The principal objection to the rate of $1.10 was that it was constructed upon an illegal rate which the State Commission had condemned. With this thought in mind, it is clear that what this Court meant in the portion of its opinion quoted by appellants was that the State Commission had not previously approved, but had condemned, the tariff which entered into and became the basis of the $1.10 rate afterwards promulgated by the Director General of Railroads; this also makes perfectly clear the reference by the Court to that rate "so ordered and filed" by the Director General. The use of the word "so" clearly shows that what the Court had reference to was the ordering and filing of a rate lawfully constructed upon a rate previously approved by the State Commission. It is thus apparent that there was no error of fact in the Court's opinion in the state-

ment that "this was not done." It is a fact that the $1.10 rate was not lawfully constructed upon a rate previously approved by the State Commission, and therefore it was not "so ordered and filed" by the Director General.

(b) Petition for Reargument, Page 7.—The alleged error of fact mentioned under (b) is based upon the same misapprehension of the Court's opinion. The part particularly objected to is: "At the time it (the Transportation Act) became effective, there was outstanding the direction of the State Board that the joint charge be one dollar, though the amount fixed by the government was $1.10."

This is strictly correct when it is understood to mean, as it clearly does when read in its context, that the joint charge of $1.00 was correct when based upon the rate which had been approved by the [fol. 137] State Board. In that sense the charge of $1.00 had been directed by the State Board, for the basis thereof had been so directed, and this was the necessary result of the Court's statement. There was, therefore, no error of fact.

(c) Petition for Reargument, Page 11.—There is nothing in the Court's opinion which suggests that it thought the rate of $1.00 was "approved as final" in New York and Penna. Co. v. New York Central, 267 Pa. 64. The Court did indicate, as is the fact, that that rate had the approval of the State Commission because the basis thereof has been approved by the Commission and by this Court in the case cited. General Order 28, as set forth in the briefs originally filed in this case, lawfully increased all the rates. The rate of $1.10 was illegal because it was constructed upon a rate which the State Commission had held unlawful in the case cited. The application of General Order 28 was purely formal and mechanical. The real question in any rate constructed thereby was whether the correct base rate had been used.

(d) Petition for Reargument, Page 11.—The criticism of the Court's opinion which is set forth under (d) is a mere criticism of words. It is alleged that the State Commission made no order when it made a finding that the rates were unreasonable. Such a finding is in effect an order and is commonly so denominated. The Court does not give any indication that is supposed any order was made except the order finding the rates unreasonable and fixing the amounts which were found to be reasonable.

[fol. 138] (e) Petition for Reargument, Page 13.—The criticism of the Court's opinion under (e) is a mere allegation of inconsistence which disappears in the light of what has already been said in this answer.

We submit that the petition should be dismissed.

T. R. White, Counsel for Appellee.

[File endorsement omitted.]

[fol. 139] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

OPINION—Filed July 8, 1924

SADLER, J.:

The New York Central Railroad Company was engaged in the transportation of coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which place it was moved by the Pennsylvania Railroad Company to Lock Haven, all of the points named being within the State of Pennsylvania. In 1916, certain tariffs were filed by the former with the Public Service Commission, and in July 1917, after protest, an order was made requiring the first named railroad to reduce the charge for transportation to forty-five cents. The Public Service Act gives the right to a complete judicial review on independent judgment where a company is aggrieved by any order of the Commission, through an appeal to the Superior Court, and thence by special allowance to this Court, and as no appeal was taken from the decision rendered, the action of the Commission is conclusive in a subsequent proceeding for reparation covering the excessive charge demanded and paid: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. Subsequent to federal control, in obedience to the statutory direction, this Court enforced the Commission's order, subject, of course, to the limitations imposed by the [fol. 140] Public Service Act,—not material here to be discussed. We accepted, as bound to do, the rate fixed by the Commission as a reasonable one for the service rendered: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. Later, in December of 1917, the Commission ordered a new rate of eighty cents between the points already referred to, to be divided between the New York Central and Pennsylvania Railroads.

On December 28, 1917, by proclamation of the President, duly authorized by Act of Congress, and made necessary by the war emergency, control of all railroads was placed in the hands of the Director General. In pursuance of the authority granted to him, a through rate of one dollar was named on June 25, 1918. On July 11, 1919, the charge was advanced, by virtue of general order No. 28, to $1.10, and this remained in effect during the further term of federal administration, which ended February 29, 1920.

The order so authorizing permitted the increase on the basis of the tariff filed by the railroads in 1916, determined, in July 1917, by the Public Service Commission to be unreasonable. The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered. As adopted, it made allowable a charge of $1.10 per gross ton instead of one dollar.

Under the Federal Act of March 21, 1918, the Director General exercised full power in the management of the roads engaged in both

interstate and intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged (Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135), and as the same directly or indirectly affected the former class of service, was given the same privilege for the period from March 1, 1920, when governmental control ceased, to the following September, covering six months, known as the guarantee period.

[fol. 141] The provisions of the Transportation Act became effective after February 29, 1920. An effort was made to protect the owners of railroads for the period of six months, and it was provided as follows: "All rates, fares and charges, and all classifications, regulations and practices in any way changing, affecting, or determining any part, or the aggregate of rates, fares or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but, prior to September 1, 1920, no such rate, fare or charge shall be reduced and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

At the time this legislation became in force there was outstanding the rate fixed by the federal authorities, and approved by the Interstate Commerce Commission, of $1.10 for the haulage of coal between the points in question, and, on August 26, 1920, by general order, a flat increase of forty percent of the sums then collectible was allowed: Ex Parte 74, 58 I. C. C. 220, 260. This resulted in giving the appellants the right to charge $1.54, if the sum allowable by governmental permission prior to March 1, 1920, was to control, but otherwise, if the reasonable sum determined by the Public Service Commission of the State was used as a structural base, in which case the rate should have been one dollar, beginning March 1, and rising to $1.40 on August 26.

It may be noted that, on complaint to the Interstate Commerce Commission, a rate of $1.10 was held to be fair in a proceeding in which the present litigants were also parties, and that this decision was rendered subsequent to March 1, but it will also be observed that the question of reasonableness was not the only issue presented, the [fol. 142] Commission saying that the manner in which the rate was arrived at is only one element in determining what was a proper sum to be charged. This ruling was made on June 18, 1920, but it is insisted that after March 1 of that year, insofar as intrastate rates were concerned, the Public Service Commission of Pennsylvania had the right to determine the question. On the other hand, the appellants urge that no reduction could be permitted during the guaranteed period without consent of the Interstate Commerce Commission, and therefore the appellees are precluded in their present claim, based on the order of reparation later made by the local regulatory body.

Prior to March 1, 1920, a second complaint, which may hereafter be referred to as complaint No. 3206, alleging improper charges, now the subject of controversy, was presented to the State Commission. A final conclusion was not reached until August 17, 1921, and that body held the reasonable pay for shipments from March 1 to August 26, should be one dollar, and for the period thereafter, $1.40. This, in effect, sustained the rate base made by the same Commission in 1917, as it passed through the successive increases made during federal control, making due allowance for those advances. From this decision no appeal was taken, though permissible, and required under the Public Service Act, as it touched or affected all matters heard and considered. Section 31, of article VI, provides: "Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act" (Act July 26, 1913, P. L. 1374), and section 17, as amended, directs that this shall be done within a period of thirty days (Act June 3, 1915, P. L. 779). A failure to so proceed operates as a waiver of the right to review: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. From the order fixing the reasonable rate no review was asked, and the appellants are now debarred from complaining of the ruling made.

[fol. 143] It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920 and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was "nugatory and of no avail." The issue was then squarely joined as to whether the Commission had power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to intermeddle with the rate in any manner until the federal tribunal had acted or authorized it to be done.

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became "subject to the Public Service Company Law," insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then section

31, of article VI, made all rulings between the parties conclusive. "Defendant attempted to re-raise the question decided in the first proceeding, but this is could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptation of that term, but because, by article VI, section 31, of [fol. 144] the act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby' "; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as further stated in L. & N. E. R. R. Co. v. Pub. Ser. Com., supra, p. 499, the ruling included the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law, and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the Commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place.

We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval.

That this is so is further apparent. Considerable stress is laid on the so-called final order, and article VI, section 31, of the Public Service Act is quoted as the basis of appellants' contention that the State Commission's order in the second complaint did not involve a consideration of the rates during the guarantee period. That this is obviously incorrect appears not only from the findings made, but also from the decision of our court in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493. "When the Commission shall determine, after hearing * * * upon complaint, that the rate * * * [fol. 145] [is] unjust * * * [it shall] determine and prescribe by specific order the * * * reasonable rate * * * to be thereafter established, demanded, exacted, charged or collected." This is in the precise language of the act of assembly. The order could relate only to rates in the future. But as stated in the Lehigh Case (page 499): "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter to consider * * * Questions on the findings are not to be taken up piecemeal.—that is, for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award * * * The Superior Court did not err in considering all questions presented to the commission or arising under the complaint." Appellants' counsel admit that had the Commission, in complaint No. 3206, being the second one, issued an

order with respect to the rates during the guarantee period, the situation now under consideration would be different, for such order would have raised at once the question of its power to make and enforce it. The record shows that after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: "Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive [this being the guarantee period], should be $1 per 2,240 pounds, and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40," being the rate here complained of. This order was made without any qualifications, and, as indicated, without any suggestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was [fol. 146] notified by the Commission that upon the presentation of a petition, accompanied by supporting date, reparation would be awarded for freight charges paid in excess of the rates herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control.

In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920, to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection during the so-called guarantee period mentioned forms the foundation of the present suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commerce Commission was secured to reduce rates during the guarantee period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved "by state or federal authority." It is clear that the local rates were held in abeyance during the period of federal control, and, as far as interstate commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1 of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493; see, L. & N. E. R. R. Co. v. Pub. Ser. Com., 79 Pa. Superior Ct. 540. As said by Judge Kephart in the decision first cited: "After the Act of 1920, the control of the

Interstate Commerce Commission was to establish a level of rates which would afford the compensation necessary to permit the main-
[fol. 147 & 148] tenance of an edquate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by state authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule."

Prior to the Transportation Act and the taking over of the railroads by the government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except as their enforcement caused discrimination against interstate commerce: R. R. Com. of Wisconsin v. C., B. & Q. R. R. Co., 257 U. S. 563; New York v. U. S., 257 U. S. 591; Texas v. Eastern Texas R. R., 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one state to another. During the war, the federal government controlled both classes, but beginning with March 1, 1920, the federal rights were limited, and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the "state or federal authority," depending on the character of the traffic, and other effective limitations of the Transportation Act.

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control. The decision enforces the order of reparation determined on that basis, making due allowance for increases which had from time to time been authorized by the Director General. As we have stated, no appeal by any party who felt aggrieved was taken from the final order, as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the court below, and, without separate discussion, the assignments of error are overruled.

The judgment is affirmed.

[fol. 149] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

MOTION AND ORDER TO HOLD RECORD—Filed July 25, 1924

New York Central Lines

DEAR SIR: I have been out of the City since the last opinion of the court in the above case was handed down and have not as yet had an opportunity to study it carefully. As a result I have been unable as yet to reach a conclusion as to whether we shall seek a reviewal of the decision or let the matter drop. As I previously intimated the

Federal question which is involved is one of considerable importance to us and we have felt that it might be necessary to seek a decision on the question by the United States Supreme Court. On the other hand, from such little study as I have given to the opinion there is a doubt in my mind whether the facts have yet been fully understood and there is a possibility that we may feel constrained to make still another application to your court for a reconsideration of the case.

In any event we desire an opportunity to study the opinion and determine what action should be followed and I am therefore writing to you to ask that the record be held for a short time and be not remitted to the lower court until we have had a reasonable opportunity to consider the opinion further and determine the procedure which we shall adopt. Unfortunately for another week or so I [fols. 150 & 151] have to be out of the City engaged in other matters and will therefore be unable to deal with the present case carefullly at once. I am therefore constrained to ask that the record be held for an additional thirty (30) days.

Yours very truly, Parker McCollester, Assistant General Solicitor. ATG.

Copy to: T. Raeburn White, Esq., 700 West End Trust Building, Philadelphia, Pa.; Henry Wolfe Bikle, Esq., General Attorney Pennsylvania Railroad System, Philadelphia, Pa.

[File endorsement omitted.]

[fol. 152] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR REARGUMENT—Filed Aug. 25, 1924

On April 21, 1924, this Court filed its original opinion in this case. The appellants believing that the opinion indicated that the Court had not been given a correct impression of the pertinent facts, filed with the Court a petition for reargument. The Court did not grant a reargument, but the original opinion of the Court was withdrawn and on July 8, 1924, the Court filed another opinion written, as was the first, by Mr. Justice Sadler.

[fol. 153] It is with regret that we feel constrained once more to apply for a reargument on behalf of the appellants. In its second opinion the court has correctly stated the material facts with reference to the dates of the changes in the freight rates under consideration. However, we believe that the Court has not yet been correctly advised as to certain facts which from its opinion appear to be material and that probably as a result of this there are what we believe to be erroneous statements of fact and conclusions in the opinion which we believe should be brought to the Court's attention. This circumstance impels us once more to petition the Court for a reargument

in order to point out the errors which we believe exist in the Court's statement of the facts and the conclusions which it has reached thereon.

In support of this petition we submit that the Court has erred in the following respects:

I

The Court erred if its decision was based upon the assumption that the issues sought to be raised by the affidavits of defense were raised and decided by the Public Service Commission in Case 3206.

In his opinion Mr. Justice Sadler states as follows:

"It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during federal control, the appellants here asserted that the Public Service Commission had no power to reduce [fol. 154] the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was 'nugatory and of no avail.' *The issue was then squarely joined as to whether the Commission has power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants denied any authority to intermeddle with the rate in any manner until the federal tribunal had acted or authorized it to be done.*

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became 'subject to the Public Service Company Law,' insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then Section 31, of Article VI, made all rulings between the parties conclusive. 'Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptance of that term, but because, by Article VI, Section 31, of the act, defendant's failure to appeal made all those rulings conclusive upon all parties affected thereby,' N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as stated in L. & N. E. R. R. Co v. Pub. Ser. Com., supra, p. 499, the ruling in- [fol. 155] cluded the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law,

and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3206, and squarely passed upon by the Commission, is evidenced not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the Court. It was only after our decision in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493, that a change of attitude by the defendants took place.

We are of the opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval." (Italics ours.)

The portion of the opinion quoted indicates that it was the view of the Court that the issue raised by the affidavits of defense and here relied upon was raised by the railroads and decided in Case 3206 before the Public Service Commission. We believe that if the Court has gained this impression from the record the impression is erroneous and that it has resulted from a misunderstanding either of the issues before the Public Service Commission or of the contentions of the appellants in this case, or both.

The language quoted, and particularly the portion in italics, sug- [fol. 156] gests that the Court has conceived that the issue raised by the affidavits of defense and the issue decided by the Public Service Commission was whether the State Commission without the approval of the Interstate Commission had the power to enter upon an investigation and make a decision with respect to the unreasonableness of the carriers' rates during the Guaranty Period. Such a conception is contrary to the facts. The railroads, as will be seen later, have never contended before the Public Service Commission that the Transportation Act, 1920, prevented the State Commission from entering upon such an investigation of their rates during the Guaranty Period and from making a decision that these rates were unreasonable. However, even if such an issue had been raised before the Public Service Commission, it is not the issue which is presented by the defense in this case.

Our defense in this case is that in view of Section 208(a) of the Transportation Act, 1920, the Court may not give judgment for the appellee in a proceeding based upon an order of the State Commission for the payment of reparation on shipments moving during the Guaranty Period unless the Intrastate Commerce Commission either before or after the action of the State Commission but at some time before the entry of such a judgment has approved a reduction of the rates applicable to those shipments below the rates in effect on February 29, 1920. We submit that the issue here to be determined is whether or not this is a good defense.

[fol. 157] (a) This Issue Was Not Raised by the Parties in the Proceedings Before the Commission

In the proceeding before the Commission two issues were raised by the complaint, the complainant alleging, first, that the rate of $1.10 would be unlawful after the termination of Federal control merely because it was in excess of the rate prescribed by the State Commission in December, 1917, and second, that if this were not so the rate would nevertheless be unreasonable.

It is true that in connection with both of the allegations of the complaint the defendants invoked Section 208(a) of the Transportation Act, 1920, but not in such a way as to raise the issues presented by their affidavits of defense in this case. In meeting the first contention of the complainant before the State Commission the contention of the railroads under Section 208(a) of the Transportation Act, 1920, was that in view of this section without further action on the part of the State authorities it could not be held that the Commission's order of December, 1917, was again applicable with full force and effect upon the termination of Federal control. On this point the Commission decided in favor of the defendants' contention as will be seen from the portion of the Commission's report appearing on pages 13(a) and 14(a) of the record in this case. With respect to the second allegation of the complaint the defendants frankly admitted the jurisdiction of the State Commission to consider and determine whether their rates were reasonable after the termination of Federal control, and upon this issue they invoked Section 208(a) of the Transportation Act, 1920, only in support of their contention that it placed the burden of [fol. 158] proof upon the complainant. On this point the Commission held against the railroads as is disclosed by the portion of the Commission's report set forth at the top of page 15(a) of the record herein.

No contention was made by the defendants at that time nor has any such contention been made since that Section 208(a) prevented the State Commission from proceeding to consider and make a decision with respect to the reasonableness of the rates after the termination of Federal control and it was never contended that the approval of the Interstate Commerce Commission was essential before the State Commission could undertake the consideration of the propriety of the rates.

The railroads, however, while making no issue with respect to the power of the Commission to pass upon the reasonableness of their rates asserted that in the event the Commission should hold the rates unreasonable, the approval of the Interstate Commerce Commission would be necessary before a reduction in the rates could be made effective. This assertion was entirely with respect to something which could only occur in the future after a decision that the rates were unreasonable and did not in any way bring in question the power of the Commission to enter upon the investigation with respect to the reasonableness of the rates.

The position of the railroads and the respects in which the provisions of the Transportation Act, 1920, were invoked by them in Case 3206 before the Commission are clearly stated at page 16 of the railroads' brief in that proceeding, a copy of which is hereto [fol. 159] attached for the Court's information. The railroads said at pages 15 and 16:

"In fact the power of a State to deal with rates is expressly recognized. Under the law there is nothing which purports to prevent a State Commission from considering an intrastate rate and ordering a reduction in any rate it finds to be unreasonable, subject of course to the qualification that because of the Federal guaranty such reduction must, prior to September 1, 1920, be approved by the Interstate Commerce Commission."

* * * * * * *

"The conclusion to which our reasoning leads and which, we submit, is that to which the Commission must adhere, is that Section 208(a) of the Transportation Act applies to intrastate rates and that it is constitutional. The necessary result is that all rates continued in effect pursuant thereto are lawful, but that this Commission has jurisdiction to consider the $1.10 rate to determine whether or not it is now reasonable. It may not order it reduced solely because it exceeds the rate fixed by this Commission in its order of December 10, 1917, but may do so, only after a finding based upon proper and conclusive evidence in this case, that the rate is unreasonably high. And even then its order for reduction must be approved by the Interstate Commerce Commission if it is to take effect prior to September 1, 1920."

The Court may have been misled by the statement of the Commission in the reparation proceeding, Case 4738, which is set forth at page 25(a) of the record herein, that the railroads contended that the Commission's decision in Case 3206 was void in so far as it attempted to effect a reduction in the rates during the Guaranty [fol. 160] Period without the Interstate Commerce Commission's approval. This contention was no more than this, that had the Interstate Commerce Commission given its approval to a reduction in the rates after the State Commission had announced its decision in Case 3206 and approved the application of the $1.00 rate therein found reasonable by the State Commission to shipments moving during the Guaranty Period, the decision in Case 3206 coupled with such approval would have constituted a proper foundation for a claim for reparation, but that without such approval the decision afforded no cause of action to the complainant for reparation. In other words, one of the two steps which were necessary to the recovery of reparation had not been fulfilled and therefore the complainant's right to reparation had not been completed. This was not, therefore, a contention by the carriers that in Case 3206 the Commission had no power to make the decision it did, but was simply a contention that

that decision remained an ineffective thing in the absence of the approval of the Interstate Commerce Commission to give it life.

We believe, moreover, that there is a clear distinction between making a decision that rates are unreasonable and making effective a reduction of those rates as applied to specific shipments pursuant to such a decision, and we believe it is because of its failure to make this distinction that the Court has fallen into the error of assuming that the issues raised by the affidavits of defense were decided by the Public Service Commission in Case 3206, while in fact they relate only to the making effective of a reduction in rates with respect to particular shipments.

[fol. 161] Under the Public Service Company Law the Commission's method of requiring that a reduction be made effective is by an order directing the carrier to establish the reduced rates or to refund by way of reparation to the shipper the difference between the rates charged and the rates found reasonable. This is clear from the provisions of the statute from which it will be seen that although the Commission may have made a decision that rates should be reduced, a railroad does not incur the penalties of the statute by continuing to charge the higher rates. It is only when the Commission has made an order directing the railroad to establish the reduced rates that the continuance of the higher rates becomes a violation of the statute for which a penalty is imposed. Likewise, in the case of a decision with respect to rates charged on past shipments, a mere decision that these rates were unreasonable does not give a shipper a cause of action in Court to recover the difference between the rates charged and the rates found reasonable by the Commission. It is only after the Commission has made and served upon the railroad an order to pay reparation and the carrier has failed to comply with the order that the shipper can proceed in Court, using the order as the basis of the suit.

So far as we can see the distinction between an opinion by a Commission that a rate is unreasonable and an order based thereon is the same as the distinction between the opinion of a Court and an order of the Court pursuant thereto. Until a Court's order has been entered no action has been taken requiring compliance with the views expressed in the Court's opinion.

[fol. 162] The only order which the Commission made in Case 3206 was with respect to rates for the future. As to the rates charged on shipments moving prior to the time when the Commission's decision was announced, all that the Commission did was to express its opinion that the rates were unreasonable. The only order possible to give effect to this opinion as to past shipments was an order for reparation and the Commission expressly stated that it withheld the making of such an order until subsequent proceedings.

Had the State Commission in Case 3206 issued a reparation order with respect to the shipments moving during the Guaranty Period such action might be held to constitute a decision by it that it had the power to make such an order. Even in that event, however, the appellants would urge that the issues raised by the affidavits of defense

were not decided by the Commission because the defense, here relied upon by the appellants, is not that the Commission was without power to order the payment of reparation, but is that a Court may not enforce such an order without the Interstate Commerce Commission's approval. Although we have denied the validity of the Commission's reparation order, such denial is based, not upon the contention that the approval of the Interstate Commerce Commission was required before the State Commission made its order, but upon the contention that this approval is required before the Court enforces the order by giving judgment thereon. The Commission has no power to enforce compliance with its orders and therefore a Court proceeding is necessary if the order is not voluntarily complied with. [fol. 163] At any time before the institution of the present suit the approval of the Interstate Commerce Commission might have been obtained, but since this was not done we contend that the order, lacking such approval, did not afford the basis of a cause of action which the Court can enforce and that the giving of judgment would constitute a direct violation of Section 208 (a) of the Transportation Act, 1920.

It must be apparent that the Commission even if in Case 3206 it had made an order requiring the payment of reparation was not undertaking to decide that a Court might give judgment upon such an order without the Interstate Commerce Commission's approval.

It must be even more apparent that this issue was not decided by the Commission when it did not even make a reparation order, but merely announced its opinion that the rates were unreasonable and withheld its action on the complainant's prayer for reparation until a subsequent proceeding.

We submit that the Commission's report in Case 3206 will be searched in vain for any language which can be construed as a decision by the State Commission that it would make a reparation order with respect to the shipments moving during the Guaranty Period without the prior approval of the Interstate Commerce Commission and much less that any language can be found in the report which can be said to constitute a decision that such a reparation order if made could be enforced by a Court without the Interstate Commerce Commission's approval.

[fol. 164] The Commission was not asked, "Will you give the complainant an order for reparation if it proves damage, and may the complainant collect this reparation straightway by means of a Court judgment without obtaining the Interstate Commerce Commission's approval with respect to the shipments moving during the Guaranty Period?" All that the Commission was asked was, "Were the rates which were charged on the complainant's shipments unreasonable and will you in a later proceeding give the complainant an order for reparation if it proves damage?" This is the only question which the Commission was called upon to answer and the only question which it decided in Case 3206.

We therefore submit that the issues raised by the affidavits of defense upon which the appellants rely were not decided by the Commission in Case 3206.

(b) These Issues Could Not Have Been Before the Commission for Decision in Case 3206

The contention which the appellants make is that two steps were required to make the rate of $1.00 effective as to shipments moving during the Guaranty Period. One of these steps was the decision of the State Commission that the rate was unreasonable and that the complainant had been damaged and was entitled to reparation. The other step was the approval by the Interstate Commerce Commission of a reduction during the Guaranty Period of the rate of $1.10 to $1.00. We do not contend that either of these steps was a condition precedent to the other. All that we do contend is that before payment of the reparation could be inforced both of them must have occurred.

[fol. 165] Since the approval of the Interstate Commerce Commission might have been given after as well as before the action by the State Commission, we submit that, since the Commission did no more than to decide that the rate was unreasonable, this decision could not have involved a decision that a reparation order could be enforced without the Interstate Commerce Commission's approval and that such decision of the question in Case 3206 would have been entirely premature. The complainant although given an opportunity to do so might never have sought reparation, or might never have produced proof of its alleged damage, or before it did so the approval of the Interstate Commerce Commission might have been secured so that the issues raised by the affidavits of defense might never have arisen. Can it be said that the Commission could decide issues which, for all that was known at the time its opinion was rendered, might never come before it?

II

The Court has erroneously applied to this case the principles announced in New York & Pennsylvania Company v. New York Central R. R. Co., 267 Pa. 64.

The Court in its opinion refers to language in its decision in the case of Lehigh & New England v. Pub. Serv. Com., 277 Pa. 493 where it cites its decision in the earlier New York & Pennsylvania Company Case in support of the proposition that questions on the findings of the Commission are not to be taken up piecemeal, that is, [fol. 166] for the future under one appeal and as to the reasonableness of the past rate on an appeal from a reparation award.

The distinction between the situation to which that proposition applies and the situation in the present case is that here the defendants do not contest the decision of the State Commission as to rates for the future and their objection to the payment of reparation is an objection which has no application to such rates. In the earlier New York & Pennsylvania Case the carrier contended that the Commission's decision was contrary to the weight of the evidence. This was a contention equally applicable to rates for the future and rates

for the past and there was reason, therefore, why the Court should say that it should not be called upon to review the question twice. And in the Lehigh & New England Case the carrier was actually appealing from the decision of the Commission both as to reparation and as to rates for the future. In the present case the defendants make no contention that the Commission's decision was contrary to the evidence and they do not contest the Commission's decision as to the future rates—their only contention being with respect to the effect of the Transportation Act upon shipments during the Guaranty Period, which contention was in no sense applicable to the rates for the future since when the Commission's decision was announced the Guaranty Period had long since expired.

[fol. 167] III

The Court's decision in the present case is in conflict with its decision in the case of Lehigh & New England v. Pub. Ser. Comm., supra.

*I*t its opinion the Court remarks that it was only after the decision in the Lehigh & New England Case that the appellants adopted their present attitude. That such is not the fact is apparent from the circumstances that the Lehigh & New England Case was not decided until April 30, 1923, while on June 1, 1920, the carriers filed their brief before the Public Service Commission in Case 3206 in which the position outlined is identical with that to which the railroads have since adhered.

However, the Court's decision in the Lehigh & New England Case did confirm the appellants in their opinion and we find it impossible now to reconcile the decision in the case at bar with the views which the Court announced in that case.

In its opinion in the Lehigh & &New England Case this Court held, if we read its language aright, that the Transportation Act, 1920, did not prevent the filing of a complaint with the State Commission relating to rates during the Guaranty Period or the consideration of such rates by the State Commission, and that the Interstate Commerce Commission must approve a reduction in the rates before such reduction became effective, but that this approval might be accorded either before or after the action of the State Commission. Thus the Court said:

[fol. 168] "Section 208(a) does not prohibit a complaint from being filed against a rate established during federal control for the guarantee period. It does prohibit a reduction in rates without the approval of the Interstate Commission."

* * * * * * *

It is not necessary to state action, that a conditional approval from Washington be first obtained. Section 208(a) reads, "No such rate * * * shall be reduced * * * unless the reduction * * * is approved." There must be prior action somewhere to secure an approval. The act of Congress intended the Interstate

Commerce Commission to act as a reviewing body over rates during the guarantee period, determining whether the reduction is a proper one, having in view the purposes of the act."

Since it was then the view of the Court that the approval of the Interstate Commerce Commission might be given after as well as before action by the State Commission, how can it now be held that an appeal from the decision of the State Commission was necessary in order to bring up for review the question of the necessity for the Interstate Commerce Commission's approval. An appeal from a decision of the Public Service Commission could be necessary in order to obtain a review on the question of the effect of the lack of the Interstate Commerce Commission's approval only if such approval was a necessary condition precedent to the State Commission's decision.

Moreover, in the Lehigh & New England Case this Court not only indicates the view that the Interstate Commerce Commission's approval may be given after the State Commission has acted as well as before, but holds, as we read the opinion, that the question of the [fol. 169] necessity for this approval in a claim for reparation cannot be made the subject of an appeal from a decision of the State Commission that the rates were unreasonable since such decision unaccompanied by an order for reparation does not damage the railroad. We can derive no other meaning from the following language of the Court (503):

Without considering the proceedings before the Interstate Commerce Commission on the complaint there filed, and, assuming the state's action was on a rate not before assailed, if we affirm this order the carrier is not injured until the state commission's order is approved by the federal commission, and afterwards only on an order of reparation."

We therefore submit that the present decision is directly in conflict with the decision in the Lehigh & New England Case and that it leaves the law with respect to the procedure to be followed in reviewing decisions of the Public Service Commission in such a state of confusion that the Court should grant a reargument in order to clarify the situation.

IV

The Court erred if it concluded that by their failure to appeal from the State Commission's decision in Case 3206 the appellants waived the defense which they here assert. If the issues now raised were not and could not have been decided by the Commission in Case 3206 and if, as we contend, no appeal could have been taken from that decision which would bring up for review these is- [fol. 170] sues, it necessarily follows that the appellants by failing to appeal did not waive their right to have the issues determined by the Court.

V

The Court erred in directing judgment for the appellee since this amounted to giving effect to the Public Service Company Law of Pennsylvania contrary to the provisions of the Transportation Act, 1920, and the Court erred in failing to hold that Section 208(a) of the Transportation Act, 1920, and the lack of the Interstate Commerce Commission's approval of a reduction of the rates constituted a complete defense to the appellee's cause of action.

That which is prohibited by Section 208(a) of the Transportation Act, 1920, is a reduction of the rates charged. The opinion of the Court is in error in that it results in denying to the Federal statute its controlling effect by enforcing a reduction of the rates.

This is the more apparent when it is observed that the provision for an appeal from the State Commission to the Courts upon which the Court's opinion seems in large part to be predicated is contained only in the Public Service Company Law and that the provisions of the Public Service Company Law can have application to shipments moving during the Guaranty Period only in accordance with the provisions of the Transportation Act, 1920. If the Transportation Act, 1920, is to be controlling, as we submit it must be, the ship-
[fol. 171] ments moving during the Guaranty Period could be subject to the provisions of the State law only as provided in the Transportation Act itself and if, as in this case, the requirements of the Transportation Act, 1920, were not complied with the appellee with respect to these shipments could derive no rights under the Public Service Company Law and the provisions of the Public Service Company Law remained inapplicable to the situation.

VI

The Court erred in stating in the third paragraph of its opinion with respect to the $1.10 rate established by the Director General that:

"The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered."

The rate of $1.10 established by the Director General could only have been unlawful if contrary to the provisions of the Federal Control Act or if held unreasonable by the Interstate Commerce Commission. The Interstate Commerce Commission expressly held that the rate was a reasonable and lawful rate and therefore the Court's statement that it was unlawful is incorrect.

[fol. 172] VII

The fourth paragraph of the Court's opinion is as follows:

"Under the Federal Act, the Director General exercised full power in the management of the roads engaged in both interstate and

intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged, (*Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135) and as the same directly or indirectly affected the former class of service, *was given the same privilege for the period from March 1, 1920, when governmental control ceased, to the following September, covering six months, known as the guarantee period.*" (Italics ours.)

The language quoted, and particularly the words italicized, indicate that it was the view of the Court that the Director General exercised authority over the rates charged during the Guaranty Period. Such is, we believe, an inaccurate statement of the law. The Director General's power to fix rates for the carriers expired with the termination of Federal control and the control of the rates during the Guaranty Period which was provided for by the Transportation Act, 1920, was to be exercised by the Interstate Commerce Commission and not by the Director General

[fol. 173]

VIII

In the next paragraph of its report the Court states:

"The provisions of the Transportation Act became ineffective after February 29, 1920, except as therein directed."

Inasmuch as the Transportation Act, 1920, was not approved until February 28, 1920, it is not, we believe, strictly accurate to say it became "ineffective" after February 29, 1920. A more correct statement of the law, we submit, would be that the authority of the Federal Government over intrastate rates became ineffective after February 29, 1920, except as provided in the Transportation Act, 1920, and the Interstate Commerce Act.

IX

In the seventh paragraph of its opinion, in referring to the decision of the Interstate Commerce Commission in which that Commission approved the $1.10 rate for the period of Federal control, the Court says:

"The question of reasonableness was not the only issue presented."

It will be observed from the opinion of the Interstate Commerce Commission appearing at page 48(a) of the record that the Interstate Commerce Commission said:

"The only issue which is properly before us is the justness and reasonableness of the rate which is assailed."

[fol. 174]

X

In the last paragraph of its opinion the Court states as follows:

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly illegal premise, and make it conform to one determined as reasonable prior to federal control."

We submit that this statement is in error. If judgment is recovered in accordance with the Court's decision the appellee will have obtained the transportation of its shipments during the Guaranty Period at a rate of $1.00 per ton. The rate which was in effect on February 29, 1920, and which was held reasonable by the Interstate Commerce Commission for transportation during the period of Federal control was $1.10. We submit that whatever reasons the State Commission may have had for finding that $1.00 was a reasonable rate, nevertheless, the enforcement of judgment in accordance with the Court's opinion would amount to a reduction of ten cents below the rate in effect at the termination of Federal control.

XI

To summarize the appellants' contention; we submit that aside from what may be called the minor errors in its opinion—the inaccurate statements which have been indicated, the Court made two serious errors and as a result reached an erroneous conclusion.

[fol. 175] First. The Court erred in concluding that even under the Public Service Company Law the failure of the railroads to appeal from the State Commission's decision in Case 3206 rendered the affidavits of defense insufficient since the issues raised thereby were not decided by the Commission and could not have been made the subject of an appeal.

Second. The Court erred in failing to conclude that regardless of the provisions of the Public Service Company Law the appellee could not recover since, because the Interstate Commerce Commission had not approved a reduction in the rates charged on appellee's shipments during the Guaranty Period below those in effect on February 29, 1920, the enforcement of judgment for the appellee would be in direct violation of Section 208(a) of the Transportation Act 1920, whose provisions must be controlling, a State statute to the contrary notwithstanding.

XII

Believing that the Court in its opinion has proceeded upon an erroneous view of the facts and the law in the particulars hereinbefore indicated, and believing also that these errors had a material effect upon the Court's decision, the appellants feel that they should seek an opportunity on reargument to set before the Court a correct statement of the facts and their arguments upon such facts.

[fol. 176] Wherefore, the appellants pray that the Court may grant them the privilege of reargument; that, pending its decision on such reargument, the Court may retain the record in this case and may not remit the same to the Court below, and that it may make such other or further order as in the premises may be proper.

Respectfully submitted, Henry Wolf Bikle, Henry Hipple, Seth T. McCormick, Jr., Parker McColester, Attorneys for Appellants.

August 25, 1924.

[fol. 177] In the Supreme Court of Pennsylvania, Eastern District

No. 169, January Term, 1924

New York & Pennsylvania Company

v.

New York Central Railroad Company, a Corporation of the State of New York, and the Pennsylvania Railroad Company, a Corporation of the State of Pennsylvania, Appellants

Appeal from the Judgment of the Court of Common Pleas of Clinton County, Pennsylvania, to No. 5, January Term, 1923

Filed July 8, 1924.

Sadler, J.:

The New York Central Railroad Company was engaged in the transportation of coal from the Munson and Hawk Run Mining Districts to Bald Eagle Junction, from which place it was moved by the Pennsylvania Railroad Company to Lock Haven, all of the points named being within the State of Pennsylvania. In 1916, certain tariffs were filed by the former with the Public Service Com- [fol. 178] mission, and in July, 1917, after protest, an order was made requiring the first named railroad to reduce the charge for transportation to forty-five cents. The Public Service Act gives the right to a complete judicial review on independent judgment where a company is aggrieved by an order of the Commission, through an appeal to the Superior Court, and thence by special allowance to this Court, and as no appeal was taken from the decision rendered, the action of the Commission is conclusive in a subsequent proceeding for reparation covering the excessive charge demanded and paid; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., 267 Pa. 64. Subsequent to Federal control, in obedience to the statutory direction, this Court enforced the Commission's order, subject, of course, to the limitations imposedby the Public Service Act,—not material here to be discussed. We accepted, as bound to do, the rate fixed by the Commission as a reasonable one for the service rendered: N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. Later in December of 1917, the Com-

mission ordered a new rate of eighty cents between the points already referred to, to be divided between the New York Central and Pennsylvania Railroads.

On January 1, 1918, due to the war emergency, control of all railroads was placed, by Act of Congress, in the hands of the Director General, and, in pursuance of the authority granted to him on June 25, 1918, a through rate of one dollar was named. On July 11, 1919, the charge was advanced by virtue of general order No. 28, to $1.10, and this remained in effect during the further term of Federal administration, which ended February 29, 1920. [fol. 179] The order so authorizing permitted the increase on the basis of the tariff filed by the railroads in 1916, determined, in July, 1917, by the Public Service Commission to be unreasonable. The rate base thus adopted was therefore unlawful, and one not determined on a reasonable charge fixed for the interstate service, as it was required to be, but on an illegal, disapproved tariff filed with the Public Service Commission, and which had been subsequently lowered. As adopted, it made allowable a charge of $1.10 per gross ton instead of one dollar.

Under the Federal Act, the Director General exercised full power in the management of the roads engaged in both interstate and intrastate commerce, with the right, subject to approval by the Interstate Commerce Commission, to fix the rates which should be charged (Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135), and as the same directly or indirectly affected the former class of service, was given the same privilege for the period from March 1, 1920, when Governmental control ceased, to the following September, covering six months, known as the guarantee period.

The provisions of the Transportation Act became ineffective after February 29, 1920, except as therein directed. An effort was made to protect the owners of railroads for the period of six months, and it was provided as follows: "All rates, fares and charges, and all classifications, regulations and practices in any way changing, affecting, or determining any part, or the aggregate of rates, fares or charges, or the value of the service rendered, which, on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until there- [fol. 180] after changed by State or Federal authority, respectively, or pursuant to authority of law; but, prior to September 1, 1920, no such rate, fare or charge shall be reduced and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

At the time this legislation became in force there was outstanding the rate fixed by the Federal authorities, and approved by the Interstate Commerce Commission, of $1.10 for the haulage of coal between the points in question, and, on August 26, 1920, by general order, a flat increase of forty percent of the sums then collectible was allowed: Ex Parte 74, 58 I. C. C. 220, 260. This resulted in giving the appellants the right to charge $1.54, if the sum allowable by governmental permission prior to March 1, 1920, was to

control, but otherwise, if the reasonable sum determined by the Public Service Commission of the State was used as a structural base, in which case the rate should have been one dollar, beginning March 1, and rising to $1.40 on August 26.

It may be noted that, on complaint to the Interstate Commerce Commission, a rate of $1.10 was held to be fair in a proceeding in which the present litigants were also parties, and that this decision was rendered subsequent to March 1, but it will also be observed that the question of reasonableness was not the only issue presented, the Commission saying that the manner in which the rate was arrived at is only one element in determining what was a proper sum to be charged. This ruling was made on June 18, 1920, but it is insisted that after March 1 of that year, insofar as intrastate rates were [fol. 181] concerned, the Public Service Commission of Pennsylvania had the right to determine the question. On the other hand, the appellants urge that no reduction could be permitted during the guarantee period without consent of the Interstate Commerce Commission, and therefore the appellees are precluded in their present claim, based on the order of reparation later made by the local regulatory body.

Prior to March 1, 1920, a second complaint, which may hereafter be referred to as complaint No. 3206, alleging improper charges, now the subject of controversy, was presented to the State Commission. A final conclusion was not reached until August 17, 1921, and that body held the reasonable pay for shipments from March 1 to August 26, should be one dollar, and for the period thereafter, $1.40. This, in effect, sustained the rate base made by the same Commission in 1917, as it passed through the successive increases made during Federal control, making due allowance for those advances. From this decision no appeal was taken, though permissible, and required under the Public Service Act, as it touched or affected all matters heard and considered. Section 31, of Article VI, provides: "Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act, the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled or modified in an appeal or proceeding taken as provided in this act" (Act July 26, 1913, P. L. 1374), and Section 17, as amended, directs that this shall be done within a period of thirty days (Act June 3, 1915, P. L. 779). [fol. 182] A failure to so proceed operates as a waiver of the right to review; N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra. From the order fixing the reasonable rate no review was asked, and the appellants are now debarred from complaining of the ruling made.

It is important to remember that in the proceeding before the State Board on the second complaint (3206), which passed upon the disputed rates fixed during Federal control, the appellants here asserted that the Public Service Commission had no power to reduce the rates between March 1, 1920, and September 1, 1920, and any attempt to do so would be void because not approved or authorized by the Interstate Commerce Commission. At the hearing then the

railroads denied to the former any power or authority whatsoever to hear and determine the case by way of a reduction of rates, and claimed such order was "nugatory and of no avail." The issue was then squarely joined as to whether the Commission had power within itself to hear and determine the reasonableness of a rate between March 1 and September 1, 1920, without the joinder of the Interstate Commerce Commission. We take from the record before us that appellants — denied any authority to intermeddle with the rate in any manner until the Federal tribunal had acted or authorized it to be done.

The Public Service Commission, at that time, decided that immediately upon the return of the railroads to a pre-war status, its authority to control followed, and they became "subject to the Public Service Company Law", insofar as relates to intrastate rates, which class of cases was exclusively under the control of the State Commission.

[fol. 183] With the record in this condition, it is apparent the parties have voluntarily submitted to a tribunal competent to hear their complaint and contention. It was imperative, if an adverse decision was rendered, that those feeling aggrieved should follow the mode pointed out by the act of assembly. If no appeal was taken, then Section 31, of Article VI, made all rulings between the parties conclusive. "Defendant attempted to reraise the question decided in the first proceeding, but this it could not then or thereafter do, not because the facts and law there laid down were res adjudicata in the usual acceptation of that term, but because, by Article VI, Section 31, of the Act, defendant's failure to appeal made all those rulings 'conclusive upon all parties affected thereby' ": N. Y. & Pa. Co. v. N. Y. C. R. R. Co., supra, p. 70. And, as further stated in L. & N. E. R. R. Co. v. Pub. Ser. Com., supra, p. 499, the ruling included the findings on which the order was based. It is elementary that where a party makes a defense before a tribunal competent to hear the cause, upon a question either of fact or law, and the conclusion is adverse, he must pursue the statutory remedy, otherwise he is bound by the decision rendered.

Had the question of the exclusive right of the Public Service Commission to deal with the rates involved not been raised, it is possible a different proposition might be before us. But that the contrary was considered and decided in complaint No. 3205, and squarely passed upon by the Commission, is evidence not only from the record in that proceeding, but from the opinion in the reparation proceedings now before the Court. It was only after our decision in L. & [fol. 184] N. E. R. R. Co. v. Pub. Ser. Com. 277 Pa. 493, that a change of attitude by the defendants took place.

We are of opinion that the appellants, through their failure to appeal from the order of the Public Service Commission, on the second complaint, No. 3206, lost their right to now complain that the reduction was effected without having been submitted to the Interstate Commerce Commission for approval.

That this is so is further apparent. Considerable stress is laid on the so-called final order, and Article VI, Section 31, of the Public

Service Act is quoted as the basis of appellants' contention that the State Commission's order in the second complaint did not involve a consideration of the rates during the guarantee period. That this is obviously incorrect appears not only from the findings made, but also from the decision of our Court in L. & N. E. R. R. Co. v. Pub. Ser. Com., 277 Pa. 493. "When the Commission shall determine, after hearing * * * upon complaint, that the rate * * * (is) unjust * * * (it shall) determine and prescribe by specific order the * * * reasonable rate * * * to be thereafter established, demanded, exacted, charged or collected." This is in the precise language of the act of assembly. The order could relate only to rates in the future. But as stated in the Lehigh case (page 499): "The appeal to the Superior Court opened all challenged findings relating to the contested rate; the final decree was not the only matter considered * * * Questions on the findings are not to be taken up piecemeal,—that is, for the future under this appeal, and the reasonableness of the past rate on an appeal from a reparation award * * * The Superior Court did not [fol. 185] err in considering all questions presented to the Commission or arising under the complaint." Appellants' counsel admit that had the Commission, in complaint No. 3206, being the second one, issued an order with respect to the rates during the guarantee period, the situation now under consideration would be different, for such order would have raised at once the question of its power to make and enforce it. The record shows that after having debated the relative positions of the parties, as hereinabove indicated, and discussed the evidence, the Commission made this finding and definitive order: "Upon all of the facts of record we conclude that the just and reasonable through rate from the Munson District and the Hawk Run District on the New York Central Railroad to Lock Haven, Pa., on the Pennsylvania Railroad for the period March 1, 1920, to August 25, 1920, both inclusive (this being the guarantee period), should be $1 per 2,240 pounds, and effective August 26, 1920, the date of the 40 per cent increase following Ex Parte 74, 58 I. C. C. 220-260, $1.40 per 2,240 pounds. Respondents will be directed by appropriate order, to establish upon one day's notice within thirty days of the service of the order the through rate of $1.40," being the rate here complained of. This order was made without any qualifications, and, as indicated, without any suggestion of being subject to the Interstate Commerce Commission, and is in no sense interlocutory. It was final, and the subject of appeal. At that time this appellant was notified by the Commission that upon the presentation of a petition, accompanied by supporting data, reparation would be awarded for freight charges paid in excess of the rates [fol. 186] herein determined, further emphasizing the determination of the Commission that the matter was exclusively within its own control.

In 1922, the Public Service Commission was asked to grant reparation to the appellees for the sums paid in excess of the dollar rate for the period from March 1, 1920, to August 26 of the same year, and $1.40 thereafter, and to award a sum which would equal the

overcharges, and this resulted in an allowance to the petitioners. The sum claimed for the excess collection during the so-called guarantee period mentioned forms the foundation of the present suit. A statement of claim was filed, and an affidavit of defense interposed, which the learned Court below held to be insufficient, with the result that judgment was entered for the plaintiff.

As noted, the defense rests on the proposition that the rate fixed as reasonable by the Public Service Commission of the State is ineffective, in that no approval of the Interstate Commerce Commission was secured to reduce rates during the guarantee period, and it is insisted such action was required under the terms of the Transportation Act. This overlooks the provision of the Congressional legislation that no changes shall be made unless approved "by State or Federal authority." It is clear that the local rates were held in abeyance during the period of Federal control, and, as far as interstate Commerce is concerned, remained subject to the action of the Interstate Commerce Commission until September 1, 1920, but after March 1 of that year, insofar as intrastate rates were concerned, the control of the State Commission again became effective: L. & N. E. R. R. Co. v. Pub. Ser. Com. 277 Pa. 493; see, L. & N. E. R. R. Co. v. Pub. Ser. Com., 79 Pa. Superior Ct. 540. As said by Judge Kephart [fol. 187] in the decision first cited: "After the Act of 1920 the control of the Interstate Commerce Commission was to establish a level of rates which would afford the compensation necessary to permit the maintenance of an adequate national railway system during the prescribed period; (2) remove discrimination against interstate commerce as a whole arising from the enforcement by State authorities of a different level of rates for a similar purpose; (3) to prevent discrimination against interstate traffic aimed at persons or localities by any intrastate rate or schedule."

Prior to the Transportation Act and the taking over of the railroads by the Government, it is clear the Interstate Commerce Commission had no control over matters affecting intrastate transportation, including the rates charged by such carriers, except as their enforcement caused discrimination against interstate commerce; R. R. Com. of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563; New York v. U. S., 257 U. S. 591; Texas v. Eastern Texas R. R., 258 U. S. 204. Here, admittedly, the shipments are of the former class alone, and do not affect the movement of freight from one State to another. During the war, the Federal Government controlled both classes, but beginning with March 1, 1920, the Federal rights were limited and, as already noted, the determination of reasonableness of charges was either within the jurisdiction of the "State or Federal authority," depending on the character of the traffic, and other effective limitations of the Transportation Act.

In the present instance, the State Commission made no attempt to reduce any rates, but to correct a charge based on an admittedly [fol. 188] illegal premises, and make it conform to one determined as reasonable prior to Federal control. The decision enforces the order of reparation determined on that basis, making due allowance for increases which had from time to time been authorized by the

Director General. As we have stated, no appeal by any party who felt aggrieved was taken from the final order, as required by our acts of assembly. We are convinced that judgment for the plaintiff was properly entered by the Court below, and, without separate discussion, the assignments of error are overruled.

The judgment is affirmed.

[fols. 189 & 190] Sept. 29, 1924.—Petition refused. Clerical error on page 2 corrected. (Signed) Per Curiam.

[fol. 191 & 192] In Supreme Court of Pennsylvania

[Title omitted]

Order for Return of Record—Filed Oct. 18, 1924

And now, October 18, 1924, it is ordered that the Record in the above entitled case be returned to the Prothonotary of the Supreme Court at Philadelphia, pending application for Writ of Error to the Supreme Court of the United States.

R. von M., Chief Justice.

[File endorsement omitted.]

[fol. 193] In Supreme Court of Pennsylvania

Petition for Writ of Error—Filed Dec. 18, 1924

To the Honorable Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania:

The petition of the New York Central Railroad Company and the Pennsylvania Railroad Company respectfully shows as follows:

I. The New York Central Railroad Company is a corporation organized and existing under the laws of the State of Pennsylvania and other states. It is engaged as a common carrier of passengers and freight in interstate commerce between points in various states and in interstate commerce within the State of Pennsylvania.

II. The Pennsylvania Railroad Company is a corporation organized and existing under the laws of the State of Pennsylvania. It is engaged as a common carrier of passengers and freight in interstate commerce between points in various states and in interstate commerce within the State of Pennsylvania.

III. Your petitioners are Appellants and the New York & Pennsylvania Company, a corporation organized and existing under the laws of the State of Pennsylvania, is the Appellee in this action which is a suit instituted by the Appellee under Article 5, Section 5, of the Public Service Company Law of Pennsylvania, to recover a refund

of a portion of the freight charges paid by the Appellee and to enforce [fol. 194] the collection of reparation awarded to the Appellee by the Public Service Commission of Pennsylvania on shipments of coal transported within the State of Pennsylvania during the period from March 1st to September 1st, 1920.

IV. This action was commenced in the Court of Common Pleas of Clinton County, Pennsylvania, by the Appellee, as plaintiff, against the Appellees, your petitioners, as defendants. The Plaintiff's statement of claim filed on or about October 22, 1922, alleged, among other things, that the defendants, your petitioners, were common carriers of coal consigned to the plaintiff and transported over the defendant's lines within the State of Pennsylvania; that there had been shipped to the plaintiff during the period from March 1, 1920, to September 1, 1920, large quantities of coal which were transported by the defendants, your petitioners; that upon such shipments transported between March 1, 1920, and August 25, 1920, both inclusive, the plaintiff paid a rate of $1.10 per ton, and on the shipments transported between August 26, 1920, and September 1, 1920, the plaintiff paid a rate of $1.54 per ton; that upon complaint by the plaintiff the Public Service Commission of Pennsylvania, in a proceeding commonly referred to as Complaint Docket No. 3206, had entered upon a hearing and on August 17, 1921, had made its report wherein it had found that the rates charged on the shipments aforesaid had been unreasonable, with respect to the shipments moving between March 1, 1920 and August 25, 1920, to the extent that they had exceeded $1.00 per ton and with respect to the shipments moving between August 26, 1920, and September 1, 1920, to the extent that they had exceeded $1.40 per ton; that there- [fol. 195] after the plaintiff had filed its petition for reparation for the excess payments; that hearings were held on this petition following which the Public Service Commission of Pennsylvania had made its order dated July 5, 1922, directing the defendants, your petitioners, to pay to the plaintiff the sum of six Thousand One Hundred and Seventy-Two Dollars and Ninety Cents ($6,172.90), with interest, and that the defendants, your petitioners, had failed and refused to pay said order or any part thereof. Copies of the report of the Public Service Commission in so-called Complainant Docket No. 3206 in which it had found the rates charged unreasonable and of its report and order in so-called Reparation Docket No. 4738 in which it had found that the plaintiff was entitled to reparation and made the order directing the defendants, your petitioners, to pay the reparation, were attached and made a part of the statement of claim.

V. Your petitioners duly filed their affidavits of defense to said statement of claim—the affidavits of defense of both your petitioners being substantially to the same effect—and in said affidavits of defense they alleged, among other things, as follows:

"For a separate and complete defense to the Plaintiff's statement of Claim, this defendant avers that the New York Central Railroad

Company's rate of 70 cents for the movement from the mines in the Munson and Hawk Run Districts to Bald Eagle Junction and the Pennsylvania Railroad Company's rate of 40 cents from Bald Eagle Junction to Lock Haven, Pennsylvania, comprising the through rate of $1.10 were on February 29, 1920, and had been for some time prior thereto, in effect on the lines of the defendants, and that the Interstate Commerce Commission in a proceeding instituted by the plaintiff under Section 10 of the Federal Control Act, reported as New York & Pennsylvania Company v. Director General, 58 Interstate Commerce Commission 124, had found this through rate to be a just, reasonable and lawful rate, a copy of which is hereto attached and made a part hereof, being marked Exhibit 'A'. This defendant [fol. 196] alleges that by Section 208(a) of the Transportation Act, 1920, unless a reduction in this rate should be approved by the Interstate Commerce Commission, this rate was the lawful rate to be charged on and after March 1, 1920, until August 26, 1920, and that the through rate of $1.54 was the lawful rate to be charged from August 26, 1920, to September 1, 1920; it alleges that the Interstate Commerce Commission had never approved a reduction in said rate of $1.10 in effect on February 29, 1920; it alleges that the provisions of the Pennsylvania Public Service Company Law were superseded by the provisions of the Federal Control Act and orders of the President thereunder, and by the provisions of the Transportation Act, 1920, including section 208(a) thereof; this defendant alleges that therefore the action of the defendants in collecting the freight charges on the basis of the said rate was not in violation of the Pennsylvania Public Service Company Law.

"This defendant alleges that Order No. 1 of the Public Service Commission of Pennsylvania, dated June 20, 1922, and attached to Plaintiff's Statement of Claim as Exhibit 'G' would have the effect of accomplishing a reduction in the rates of the defendants for the period from March 1, 1920, to September 1, 1920, contrary to the terms of Section 208(a) of the Transportation Act, 1920, and was therefore null and void.

"This defendant alleges that since said order No. 1 of the Public Service Commission of Pennsylvania dated June 20, 1922, was null and void, the plaintiff had no cause of action under Section 5 of Article 5 of the Public Service Company Law."

VI. Thereupon the plaintiff, the New York & Pennsylvania Company, obtained a rule upon the defendants, your petitioners, to show cause why judgment should not be entered in favor of the plaintiff and against the defendants, your petitioners, for want of a sufficient affidavit of defense.

VII. Upon the motion of the plaintiff, the New York & Pennsylvania Company, the Court of Common Pleas of Clinton County, Pennsylvania, made absolute the rule to show cause and directed that judgment be entered for the plaintiff. Judgment was thereupon entered as follows:

[fol. 197] "And now, July 23, 1923, by the direction of the Court, judgment is entered in favor of the plaintiff and against the defendants, for the sum of Six Thousand Five Hundred Forty-six 44/100 Dollars, as follows:

Principal	$6,172.97
Interest from July 20, 1922 to July 23, 1923	373.46
Real Debt	$6,546.43

Entered July 23, 1923. Judgment, $6,546.43."

VIII. The defendants, your petitioners, duly excepted to the order and at their request a bill was sealed.

IX. Thereupon the defendants, your petitioners, duly appealed from said order and judgment to the Supreme Court of Pennsylvania, Eastern District. Said appeal came on for argument before said Supreme Court of Pennsylvania, Eastern District, and your petitioners, through their counsel, duly argued that said judgment should be reversed and that the suit should be dismissed for the reason that the enforcement of judgment against your petitioners would be in violation of Section 208(a) of the Transportation Act, 1920; that since the Interstate Commerce Commission had not approved a reduction in the rates charged on the Appellee's shipments below the rates in effect on February 29, 1920, the order of the Public Service Commission awarding reparation to the Appellee in the amount of the difference between the rates in effect on February 29, 1920, and charged on the Appellee's shipments, and lower rates which the Public Service Commission of Pennsylvania determined would have been reasonable, was null and void by reason of the provisions of Section 208(a) of the Transportation Act, 1920, and that because of the said provisions of said Act, the Appellees was without any cause of action under the Public Service Company Law of Pennsylvania.

[fol. 198] X. Thereafter and on or about April 21, 1924, the Supreme Court of Pennsylvania entered its order affirming the judgment of the Court of Common Pleas. Subsequently your petitioners, believing that the opinion of the Court was based upon an erroneous understanding of the facts, filed a petition for reargument. Thereupon the Court withdrew its original opinion. On July 8, 1924, the Court filed another opinion affirming the judgment of the Court of Common Pleas of Clinton County. Believing that the Court still erred in its understanding of the facts and in its conclusion of law, your petitioners on August 25, 1924, filed a second petition for reargument. This petition was considered by the Court and on September 29, 1924, the Court entered an order denying the petition, but correcting a clerical error in its opinion.

XI. Said decisions of the Court of Common Pleas of Clinton County and of the Supreme Court of Pennsylvania, and each of them, decided in favor of the validity of a statute of the Common-

wealth of Pennsylvania or authority exercised under said statute, the validity of which was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and said decisions were in error, to the prejudice of your petitioners, as will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioners pray that a Writ of Error from the Supreme Court of the United States may issue in this case to the Supreme Court of Pennsylvania, Eastern District, for the correction of errors complained of, and that a transcript of record, proceedings, and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Pennsylvania, may be sent to the Supreme Court [fol. 199] of the United States as provided by law and that your petitioners may have such other and further relief in the premises as may be just.

Henry Wolfe Bikle, Broad Street Station, Philadelphia, Pa.; Parker McCollester, 466 Lexington Avenue, New York, N. Y., Attorneys for Petitioners.

[fol. 200] State of New York,
County of New York, ss:

David E. Gelatt, being duly sworn, deposes and says that he is the General Coal Freight Agent of The New York Central Railroad, one of the plaintiffs in error herein, that he has read the foregoing petition and that the facts therein set forth are true to the best of his knowledge, information and belief.

D. E. Gelatt.

Signed and sworn to before me this 16 day of December, 1924. Charles McLernon, Notary. Notary Public, Nassau County. Certificate filed in New York County. N. Y. County Clerk No. 133. N. Y. Register No. 5103. My Commission expires March 30th, 1925.

[File endorsement omitted.]

[fol. 201] In Supreme Court of Pennsylvania

[Title omitted]

Assignment of Errors—Filed Dec. 18, 1924

Now come the New York Central Railroad Company and The Pennsylvania Railroad Company, plaintiffs in error, and make and file this their assignment or errors.

1. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below

erred for the reason that by virtue of Section 208(a) of the Transportation Act, 1920, the plaintiff below was without a cause of action under the Public Service Company Law of Pennsylvania.

2. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the action below and in affirming the judgment of the Court of Common Pleas of Clinton County on plaintiff's motion for judgment for want of a sufficient affidavit of defense, erred for the reason that the defendants' affidavits of defense stated a complete defense to the complainant's cause of action; namely, that the freight charges collected on the shipments of the plaintiff below were in accordance with the rates in effect on February 29, 1920; that no reduction in those rates as [fol. 202] applied to shipments transported between March 1, 1920, and September 1, 1920, had been approved by the Interstate Commerce Commission as required by Section 208(a) of the Transportation Act, 1920, and that therefore the order for reparation issued by the Public Service Commission of Pennsylvania upon which the suit was predicated was void and unenforcible and the plaintiff below had no cause of action under the Public Service Company Law of Pennsylvania.

3. The Supreme Court of Pennsylvania, Eastern District, in refusing to direct a dismissal of the complaint in the court below erred for the reason that the freight rates collected by the plaintiffs in error on the shipments made by the plaintiff below were lawful under Section 208(a) of the Transportation Act, 1920, and were therefore not in violation of the Public Service Company Law of Pennsylvania, and the plaintiff below had no cause of action under the provisions of that Act.

4. The Supreme Court of Pennsylvania, Eastern District, erred in holding that Section 208(a) of the Transportation Act, 1920, was not a restriction upon the power of the Public Service Commission of Pennsylvania to order a reduction in rates on shipments moving between March 1, 1920, and September 1, 1920.

5. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the order for reparation issued by the Public Service Commission upon which plaintiff's cause of action below was predicated was not a reduction in the rates on shipments moving between March 1, 1920, and September 1, 1920, and void by reason of the provisions of Section 208(a) of the Transportation Act, 1920.

[fol. 203] 6. The Supreme Court of Pennsylvania, Eastern District, erred in holding that the plaintiffs in error were precluded from setting up the defense relied upon by them because of their failure to appeal from the decision of the Public Service Commission of Pennsylvania in Complaint Docket No. 3206.

By reason whereof, these petitioners and plaintiffs in error pray that the judgment of the Supreme Court of Pennsylvania, Eastern

District, may be reversed and that they may have such other and further relief in the premises as may be just.

Dated at Philadelphia, Pa., this 17th day of December, 1924.

Henry Wolf Bikle, Broad Street Station, Philadelphia, Pa.; Parker McCollester, 466 Lexington Avenue, New York, N. Y., Attorneys for Plaintiffs in Error.

[fol. 204] [File endorsements omitted.]

[fol. 205] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Dec. 18, 1924

On reading of the petition of The New York Central Railroad Company and the Pennsylvania Railroad Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Pennsylvania, Eastern District, as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One Thousand Dollars, that the said plaintiffs in error shall prosecute said writ of error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

In witness whereof, I have hereunto set my hand this 18 day of December, 1924.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, Eastern District.

[File endorsement omitted.]

[fol. 206] IN SUPREME COURT OF PENNSYLVANIA

WRIT OF ERROR—Filed Dec. 19, 1924

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania, before you or some of you, being the highest court of law

or equity of the said State in which a decision could be had in said suit between New York Central Railroad Company and Pennsylvania Railroad Company, Plaintiffs in Error and New York & Pennsylvania Company, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the [fol. 207] United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said New York Central Railroad Company and Pennsylvania Railroad Company, Plaintiffs-in-Error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 19th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk of the United States Dist. Court, E. D. of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by R. von Moschzisker, Chief Justice of the Supreme Court of *the* Pennsylvania.

[File endorsement omitted.]

[fols. 208 & 209] Citation—In usual form, showing service on T. R. White; filed Dec. 19, 1924; omitted in printing

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[fol. 210] Bond on Writ of Error for $1,000—Approved and filed Dec. 19, 1924; omitted in printing

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[fol. 211] In Supreme Court of Pennsylvania

Praecipe for Transcript of Record—Filed Dec. 19, 1924

Kindly forward and remit to the Supreme Court of the United States the entire record in the case of the New York and Pennsyl-

vania Company, defendant in error, and the New York Central Railroad Company and The Pennsylvania Railroad Company, plaintiffs in error, with respect to which a Writ of Error was allowed by the Chief Justice of the Supreme Court of Pennsylvania on December 18, 1924.

James I. Gowen, Of Counsel for Plaintiff in Error.

[File endorsement omitted.]

[fol. 212] IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire record in the case of New York & Pennsylvania Company vs. New York Central Railroad Co. and Pennsylvania Railroad Co., at No. 169, January Term, 1924, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this twenty-sixth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

[fol. 213] IN SUPREME COURT OF PENNSYLVANIA

JUDGE'S CERTIFICATE TO CLERK

I, Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify that Thomas Robins was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 26th day of December, one thousand nine hundred and twenty-four.

Robert von Moschzisker, Chief Justice.

IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE TO JUDGE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania in and for the Eastern District, do certify that the Honorable Robert von Moschzisker, by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania, to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this twenty-sixth day of December, one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

Endorsed on cover: File No. 30,756. Pennsylvania Supreme Court. Term No. 791. New York Central Railroad Company and Pennsylvania Railroad Company, plaintiffs in error, vs. New York & Pennsylvania Company. Filed December 27, 1924. File No. 30,756.